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When Interests Diverge

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THE CONTESTED RIGHT TO VOTE

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THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES. By *Alexander Keyssar.* New York: Basic Books. 2000. Pp. xxiv, 467. $30.

I. INTRODUCTION

For those who believe the United States is a representative democracy with a government elected by the people, the events of late 2000 must have been more than a little disconcerting. In the election for our most important public office — our only truly national office[1] — the candidate who received the most popular votes was declared the loser while his second place opponent, who had received some 540,000 fewer votes, was the winner.[2] This result turned on the outcome in Florida, where approximately 150,000 ballots cast were found not to contain valid votes. Further, due to flaws in ballot design, thousands of other Florida ballots almost certainly failed to reflect the intentions of the voters who cast them. The number of uncounted ballots and votes arguably misrepresented by the butterfly ballot was far greater than the difference in votes between the first-place and second-place presidential candidates in the state. Studies later found that between four and six million votes were lost nationwide in the 2000 election, with 1.5 to 2 million votes lost due to faulty voting equipment and confusing ballots. Several states had higher rates of spoiled presidential ballots than Florida.[3]

The 2000 election also generated two Supreme Court decisions with problematic implications for the right to vote in presidential elections. In *Bush v. Palm Beach County Canvassing Board*,[4] a unanimous

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1. Anderson v. Celebrezze, 460 U.S. 780, 795 (1983) ("[T]he President and the Vice President of the United States are the only elected officials who represent all the voters in the Nation.").

2. The final results for the 2000 presidential election gave Al Gore 50,999,897 votes, or 48.38% of the total and George W. Bush 50,456,002, or 47.87%. Gore's margin was 543,895. *See* http://fecweb1.fec.gov/pubrec/2000presgeresults.htm (last visited Jan. 30, 2002).

3. REPORT OF THE CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS, WHAT COULD BE 7-9, 17 (2001) [hereinafter CALTECH/MIT STUDY].

4. 531 U.S. 70 (2000).

Court indicated that the Florida Supreme Court lacked authority to protect the rights of voters by extending the period for conducting manual recounts of disputed presidential ballots.[5] *Bush v. Gore*[6] flatly declared that "[t]he individual citizen has no federal constitutional right to vote in presidential elections." Rather, "the state legislature's power to select the manner for appointing electors is plenary; it may, if it so chooses, select the electors itself"[7] — which, indeed, had been the plan of Florida's Republican legislature if the recount ordered by the state supreme court had resulted in a victory for Vice-President Gore.[8] *Bush v. Gore* held that the Florida Supreme Court's effort to require a statewide manual recount of the undervote ballots[9] — that is, those ballots cast by voters that the ballot-counting machinery determined contained no vote — was unconstitutional.

Yet, *Bush v. Gore* may have also ushered in a dramatic extension of federal constitutional protection of the right to vote when the Court held that the Equal Protection Clause of the Fourteenth Amendment applies to the mechanics of election administration — a subject traditionally left to the states, and often delegated by the states to local governments. The Court found that the Florida recount order was constitutionally flawed because it failed to address the differences in standards used by local election officials in evaluating similarly marked ballots.[10]

Neither the dismissal of the presidential popular vote and Florida's uncounted voters, nor the new federal constitutional review of local election administration — nor the combination of the two — would come as a surprise to a reader of Alexander Keyssar's[11] magisterial history of the right to vote in the United States. Published before the 2000 election, *The Right to Vote*'s major themes are sharply reflected in the 2000 election's legal issues and their judicial resolution.

Keyssar's central point, captured in his subtitle, is the deeply "contested" nature of the vote in the United States over more than two centuries. Keyssar directly challenges the "Whig interpretation"[12]

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5. *Id.* at 77.

6. 531 U.S. 98 (2000).

7. *Id.* at 104.

8. *See, e.g.*, ABNER S. GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 163-67 (2001).

9. *See* Gore v. Harris, 772 So. 2d 1243 (Fla. 2000).

10. Bush v. Gore, 531 U.S. at 105-09.

11. Professor of History and Public Policy, Duke University.

12. P. xvii. The "Whig interpretation" of the expansion of the right to vote in America has been previously flagged and challenged. *See* Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 336-37 (1989). The phrase "Whig interpretation" comes from Herbert Butterfield's critique of those histories of England which treated English history as consisting of gradual but inevitable reform and progress. *See* HERBERT BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (1951). A leading

of the history of the right to vote, with its "triumphalist presumption" (pp. xvii, 68-70) of a steady, inexorable, "unidirectional" (p. xviii) enlargement of the franchise. Instead, Keyssar demonstrates that the history of the suffrage has been marked by both forward and backward movement. Efforts to enlarge the polity and include previously excluded groups have been countered by doubts about democracy, resistance to suffrage expansion, and adoption of measures reducing the opportunity to vote. In the 1960s, however, a corner was apparently turned, and today nearly all adult citizens are entitled to vote. Even so, the earlier history continues to leave its mark on our political process.

The 2000 election and *Bush v. Gore* nicely embody our conflicted heritage: the eighteenth century provisions that vest selection of the president in an Electoral College chosen according to rules set by state legislatures; the emergence of the presidential popular vote, along with administrative practices that often operate to impede the ability to vote; and the late twentieth century effort of the Supreme Court to promote the equal treatment of voters. The public debate over the recount also brought forward to the present some of the past conflicts over the scope of the franchise — with the rhetoric of "make every vote count" echoing earlier democratic calls to widen the vote, and the disdain manifested by some commentators and judges[13] for voters who failed to follow instructions on how to punch out their chads or were bewildered by the butterfly ballot recalling previous public assertions about the unfitness of some groups for the ballot.

Although the central thrust of Keyssar's study is his persuasive challenge to the assumption of a progressive unfolding of voting rights, his book ends on a relatively upbeat note, emphasizing the broad availability of the franchise today. His concern is to show how hard it was and how "very long" (p. 316) it took to get to this point in our history. Examining this history will be the focus of Part II of this Review.

Yet, although Keyssar's book is titled *The Right to Vote*, both his history and current legal doctrine raise questions about whether and to what extent voting is a right at all. Initially, as Keyssar demonstrates, voting was not seen as a right, but as a privilege to be provided to those thought best qualified to participate in governing the community. Even as the franchise was expanded, the vote continued to retain something of its foundation in government-bestowed privilege. Today, the vote comes closer to being a right of all members of the political community. Yet, as I will suggest in Part III, voting's status as a right is

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"Whig" treatment of the right to vote in the United States is CHILTON WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860 (1960).

13. *See, e.g.*, Bush v. Gore, 531 U.S. at 119 (Rehnquist, C.J., concurring) ("No reasonable person would call it . . . a 'rejection of legal votes' . . . when electronic or electromagnetic equipment . . . fails to count those ballots that are not marked in the manner that . . . voting instructions explicitly and prominently specify.").

still contested. Some groups remain unenfranchised. There is no right to have decisions made by popular vote. Most importantly, even where voting is provided, a wide variety of political considerations and institutions — federalism, legislative districting, ballot access rules, the costs of administration, campaign finance law — operate to constrain voters' choices. Government still gets to shape the role of voting in the political system even if it has less control over who gets to vote. The significance of popular voting in our political process remains a matter of politics as much as it is a matter of rights.

II. THE EVOLUTION OF THE FRANCHISE

Keyssar divides the history of voting in America into four long periods: (i) the colonial era, when the most important qualification for voting was ownership of property; (ii) the first democratic ascendancy, running from the end of the eighteenth century to the eve of the Civil War, when property qualifications were largely eliminated and most adult white male citizens (and some noncitizens) were enfranchised; (iii) a "slow Thermidor" between the Civil War and the Second World War when various restrictions and procedures rolled back some of the gains of the antebellum period and to a considerable degree offset the suffrage expansions produced by the Fifteenth and Nineteenth Amendments, and (iv) a resurgence of democratic commitments after World War II, which led to a broader suffrage and significant federal legislative and judicial protection of the vote.

A. *Before the Revolution*

"[T]he lynchpin of both colonial and British suffrage regulations was the restriction of voting to adult men who owned property" (p. 5). Voting was not a natural right but a state-granted privilege — as the term "franchise" suggests[14] — and that privilege was extended only to those believed capable of providing sound governance for the polity. For people of that era, only property ownership could assure the capacity of the voter to decide questions of community governance. Property supplied independence; those without property were presumed to be economically dependent on and subservient to others. As a result, they would be subject to political manipulation and control by their economic patrons and social betters.[15] The propertyless, with the rest of the community, would be better off with virtual representation

14. As Keyssar explains, "in early English usage, the word *franchise* referred to a privilege, immunity or freedom that a state could grant, while the term *suffrage* alluded to intercessory prayers." P. 9.

15. *See* Steinfeld, *supra* note 12, at 342-48 (describing contemporary views concerning economic, social and political relationships of dependence and governance).

by the propertied. As Keyssar slyly notes, the concern that the propertyless lacked "will" and would simply be tools for a wealthy elite was sometimes joined with the opposite fear that the propertyless might have too much will and use their votes to advance their own interests (p. 11). But the dominant focus was on the connection between property and the capacity for independent judgment. The property test and other colonial era franchise rules[16] limited the vote to about sixty percent of adult white males, albeit with considerable variation from colony to colony, within colonies, and over time.

B. *The First Democratic Ascendancy*

Over the first half of the nineteenth century, property requirements were progressively relaxed and ultimately abolished. While many of the states initially replaced property ownership with a tax-payment requirement, by 1855 all but six states had dropped their insistence that voters pay taxes, and in several of the states that retained the tax-payment test the amount of tax required was quite minimal. As a result, the vast majority of the states enfranchised most of their adult white male residents.

The Revolution and its aftermath were critical to changing views about the nature of the suffrage.

> [T]he political and military trauma of breaking with a sovereign power, fighting a war, and creating a new state — served to crack the ideological framework that had upheld and justified a limited suffrage. The concept of virtual representation was undermined; the notion that a legitimate government required the 'consent' of the governed became a staple of political thought; and a new, contagious language of rights and equality was widely heard. (pp. 24-25)

Property ownership requirements came to be seen as inconsistent with the claims of nonowners — Revolutionary War veterans, militiamen, propertyless taxpayers, and others — who were subject to government regulation, and, thus, had a stake in the political process.

The growing sense that voting was the means of self-government and not just a privilege of propertied independence combined with

16. These requirements included religion, race, gender, residency, and citizenship, although the rules varied considerably across the colonies and were not always spelled out in law. On occasion, property ownership trumped other concerns, so that nonresident property owners, or property-owning blacks and women could vote in some colonies at least for some elections. P. 6. On the other hand, religious, racial or gender requirements tended to define the political community and resulted in the disfranchisement of some property owners. P. 6. Some of these exclusions might also be connected to the notion of independence. Thus, most colonies barred women from voting "because they were thought to be dependent on adult men." P. 6.

Voting rules might also vary within a colony, with qualifications to vote in local elections, especially in the larger cities, differing from qualifications to vote for colonial or provincial officers. P. 6.

economic and social change. With the onset of urbanization and industrialization, more men earned a living without owning property. Even on the farm, more men owned smaller holdings or worked the land as lessees or tenant farmers, not freeholders. As a result, a growing portion of adult white men were unable to meet property ownership requirements. At the dawn of the republic, property tests might have been able to coexist with emerging political egalitarian beliefs because Americans visualized their nation as one in which property, and, therefore, the suffrage, was broadly distributed. By the mid-nineteenth century, the only way to provide the broad suffrage the democratic ideology of the times required to an increasingly propertyless population was by abolishing property-ownership requirements.

"Democracy ascendant" (p. 26) had other consequences. Religious tests were dropped, some states liberalized their residency requirements, and a handful of states enfranchised resident aliens who had "declared" an intent to seek citizenship.[17]

Yet, voting did not become a right, either descriptively or normatively, even for adult white men. A dozen states "preserved a link between economic status and enfranchisement" (p. 61) by denying the right to vote to paupers. By receiving public relief, paupers "had surrendered legal control of their own time and labor" (p. 62) and were legally dependent. The pauperage exclusion reflected the continuing, albeit diminished, power of the pre-Revolutionary independence model of voting. In many states, the franchise was also withheld from men who had committed "infamous crimes."[18] Voting, thus, remained to some extent a privilege of the morally qualified and the economically independent, although independence was defined in terms of the absence of dependency on the state rather than the ownership of capital. Voting was also largely a privilege of white males. Racial exclusions hardened, with all but five states limiting the franchise to whites. And in 1807, New Jersey, the one state that had permitted women to vote, limited the franchise to men. With the demise of property tests, race and gender had become more salient for voting.

Moreover, suffrage was a state matter, not an aspect of national citizenship. The federal Constitution largely sidestepped the question of the vote. Only one branch of the federal government — the House of Representatives — was popularly elected. Rather than set federal voting criteria, the Constitution provided that qualifications for voting for members of the House of Representatives would vary from state to state according to each state's qualifications for voting for the "most

17. *See* pp. 32-33. Between 1848 and the start of the Civil War, six states in the Upper Midwest and the West, seeking to encourage new settlement as well as to acknowledge the importance of resident aliens to their communities, adopted "declarant" alien suffrage.

18. By the eve of the Civil War, two dozen states disfranchised men who had committed serious crimes, although "such provisions were neither universal nor uniform." P. 63.

numerous Branch of the State Legislature."[19] The members of the Senate were chosen by the state legislatures and not by the voters.[20] The President and Vice-President were elected by an Electoral College consisting of electors appointed by each state "in such manner as the legislature thereof shall direct."[21] Voting was in no sense a federal constitutional right.

Keyssar argues that the expansion of the vote in this period was due, in part, to the failure of contemporary leaders to foresee the future development of a large industrial working class. Although industrialization, urbanization, and immigration had begun, the social consequences of these developments were not yet "clearly or widely visible" (p. 69). There were artisans, mechanics, and shopkeepers, but no large urban proletariat. Although agriculture witnessed a growth in the percentage of smallholders and tenant farmers, there was no European-style landless peasantry — or rather there was one, but it was black, largely enslaved, and, barred by racial exclusions even if economic barriers to voting were lifted. The elimination of economic tests was intended to enfranchise the lower middle class, craft workers, and yeoman farmers, not the industrial working class or the peasantry; according to Keyssar, the suffrage would not have been so widened if there had been a large industrial working class or free peasantry.[22]

In correcting for the traditional assumption of an innate American commitment to democracy, Keyssar may not give sufficient credit to the decisions by thousands of officeholders, convention delegates, and referendum voters in many states to voluntarily extend the franchise from themselves to others not entitled to vote. Without the prodding of Congress, the President, the courts, or, for the most part, massive public protests[23] — the factors that drove the franchise extensions of

19. U.S. CONST. art. I, § 2, cl. 1.

20. U.S. CONST. art. I, § 3, cl. 1. One hundred and twenty-five years later, the direct election of Senators followed the same pattern. Instead of adopting a federal voting rule, the Seventeenth Amendment provided that the qualifications for voting in Senate elections are the same as those "requisite for the most numerous branch of the State legislatures."

21. U.S. CONST. art. II, § 1, cl. 2.

22. *See* pp. 67-70.

23. The most dramatic exception to the general pattern of peaceful expansion of the suffrage was the so-called Dorr War in Rhode Island. Pp. 71-76. Rhode Island continued to be governed by its colonial charter, which limited the vote to "freemen" who owned real estate valued at $134 or rented property for at least $7, into the 1840s. In the eighteenth century, three-quarters of the adult males met the requirements, but due to rapid urbanization and industrialization by the 1830s substantially less than half the adult white men could vote. Many of those excluded were factory workers and immigrants, including many Irish Catholics. Propertied opposition repeatedly blocked charter reform efforts. "The conflict came to a boiling point in 1841" when mechanics and workingmen formed a new, militant organization, convened their own People's Convention, and there drafted a constitution providing the vote to all adult white men who met a one-year residency requirement. P. 72. In January 1842 a clear majority of Rhode Island adult white males voted to ratify the new constitution. The charter government, however, refused to yield and passed laws imposing

the post-World War II period — elected representatives repeatedly proposed to extend the franchise to those who had not elected them, with those actions often confirmed by already-enfranchised voters. By 1855 voting was more than a privilege of the propertied or associated with a special capacity for political decisionmaking. Instead, voting was to a considerable degree an attribute of membership in the political community. The pauperage, felony, race, and gender restrictions — as well as the less controversial rules requiring residency, and, in most states, citizenship — were as much definitions of the political community as qualifications for voting.

Still, Keyssar supports his more jaundiced view by pointing out that the first efforts to curtail the franchise began around 1855 in just those states where industrialization and immigration were most politically salient.[24] His critical analysis gains further traction from the history of the suffrage after the Civil War.

C. *"Slow Thermidor": From the Civil War to World War II*

The heart of Keyssar's study is the "slow Thermidor" (p. 80) between the Civil War and World War II when faith in democracy was challenged by doubts about the ability of ordinary people to exercise the vote intelligently, and class, ethnic, and racist prejudices gave rise to new restrictions on the franchise.

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harsh penalties on those who participated in elections and meetings under the People's Constitution. For several weeks in 1842, the "People's" government and the charter government contended for power. On May 18, the People's governor, Thomas Dorr, and a small group of armed followers "attempted to exercise their sovereign power by assembling in front of the state arsenal and demanding that it be turned over to them. When their demands were refused, they attacked the arsenal, but both of their cannons misfired, and the Dorrites were then beaten back .... Over the course of the next few months, radical suffrage advocates attempted a few other military escapades (resulting in several deaths), with similar disheartening and tragicomic results." P. 74. The charter government, backed by federal troops, remained in control. But chastened by events, it adopted new franchise requirements permitting all native-born adult males (including blacks) to vote if they met a minimal taxpaying requirement. Foreign-born naturalized citizens, however, were obliged to meet a property test and a lengthy residency requirement. In addition, only property owners were allowed to vote in Providence municipal elections.

24. Connecticut in 1855 and Massachusetts in 1857 became the first states to adopt literacy tests. Massachusetts confirmed the anti-immigration intent of the test by also adopting the nation's first grandfather clause — an exclusion from the test for all citizens who had previously voted. P. 86. In 1859, Massachusetts passed a measure requiring newly naturalized citizens to wait two years until they could vote. This was subsequently repealed.

Keyssar also cites Rhode Island's Dorr War as supporting his thesis that the franchise was extended to the propertyless only because there was no industrial working class. As he notes, Rhode Island had the most urbanized and industrialized workforce in the United States, and one of the highest rates of immigration. In Rhode Island, white male suffrage would have enfranchised the working class, not the middle class. Consequently, Rhode Island's landowners resisted suffrage expansion more intensely than did their counterparts in any other state. *See* p. 71.

The right of black Americans to vote was a central issue in this period. Blacks demanded the ballot as a means of protection against hostile white Southerners, as an expression of their new status as free citizens, and as an acknowledgment of their loyalty and of the sacrifices black soldiers had made for the Union cause. However, racism, sometimes thinly veiled by references to the lack of political experience and education of the formerly enslaved, initially led most states to reject efforts to repeal racial tests for voting.[25] This led to the first federal involvement in state suffrage questions. Initially, Congress took "an oblique approach." The Fourteenth Amendment provided that a state that denies the vote to its adult male citizens "except for participation in rebellion, or other crime" would have its representation in Congress reduced. This was a "clear constitutional frown at racial discrimination" (pp. 90-91), and one likely to affect the South far more than the North due to the concentration of blacks in the Southern states.[26] But by not flatly barring discrimination, the Fourteenth Amendment also "tacitly recognized the right of individual states to erect racial barriers."[27]

Intense Southern hostility to freed blacks, including violent opposition to black efforts to vote,[28] drove the Republicans in Congress to take a more radical approach to protect black voting rights. The Reconstruction Act of 1867 authorized federal military rule for the region and made re-admission of the secessionist states contingent on their ratification of the Fourteenth Amendment and adoption of state constitutions that permitted blacks to vote on the same terms as whites. Resistance to black enfranchisement remained powerful, however. Faced with Democratic electoral gains in the North and fearing that "control of the national government might be slipping from their grasp" (pp. 93-94), Congressional Republicans moved to entrench the

25. Between 1863 and 1870, black enfranchisement was defeated in fifteen Northern states and territories, passing in just two Northern states with small black populations. *See* p. 89.

26. The representation clause was also a response to the de facto elimination of the notorious three-fifths clause by the abolition of slavery. Formerly enslaved blacks would now be fully counted in determining the allocation of seats in the House of Representatives and votes in the Electoral College. This would sharply increase the representation of the South. Unless steps were taken to enfranchise blacks, one perverse effect of the Civil War would be to strengthen the national political power of the unrepentant whites in the former Confederacy.

27. P. 91. Moreover, by its express reference to adult "male inhabitants" in setting the baseline for full enfranchisement, the Amendment implicitly confirmed the disfranchisement of women. In addition, in the twentieth century, the Supreme Court interpreted the "rebellion or other crime" proviso as a constitutional justification for the disfranchisement of convicted felons. *See* Richardson v. Ramirez, 418 U.S. 24 (1974). For further discussion of the disfranchisement of felons, see *infra* Section III.A.

28. In New Orleans, "one of the most flagrant incidents of violence" occurred when advocates of black suffrage attempted to hold a constitutional convention. Thirty-four blacks and four whites were killed, with scores of others wounded. P. 91.

voting rights of Southern blacks — and to add black voters to the Republican base in both the North and the South — with an additional constitutional amendment. Radical Republicans pushed for a broad affirmation of the right to vote. Indeed, the Senate passed Senator Wilson's proposal to ban any denial of the vote to a citizen based on "race, color, nativity, property, education, or creed" (p. 91). Ultimately, however, Congress adopted a much more limited measure banning discrimination based only on race, color, or previous condition of servitude.

Senator Wilson and his allies had argued that an amendment phrased in terms of race and slavery alone would be circumvented. Their concerns were ultimately vindicated by the course of events in the South. Congress initially responded vigorously to the "politicized vigilante violence" (p. 106) against black candidates and voters and their white Republican allies by making interference with voting a federal offense, punishable in federal court, and authorizing the President to deploy the army to defend the electoral process. As part of the settlement of the disputed election of 1876, however, federal troops were withdrawn from the South. In 1878, Democrats won control of Congress and further reduced the federal role in protecting black and white Republican voting rights against white Democratic "Redeemers." The next dozen years were a "period of limbo and contestation" (p. 108), with Southern Democrats using gerrymandering, complicated ballot configurations, administrative devices, and occasional violence and fraudulent vote counts to curtail black voting, but blacks, in alliance with white Republicans and some groups of poor and upcountry white Democrats, continued to contest elections, vote, and win office.

The beginning of the end came in 1889-91 when, although the Republicans were back in power, the federal government failed to pass voting rights enforcement legislation. This "signaled to the South that the federal government was not prepared to act energetically to guarantee the voting rights of blacks" (p. 110). When Democrats subsequently regained control of the federal government, "they amplified that signal by repealing the enforcement acts of the 1870s" (p. 111). The Southern states then moved systematically to disfranchise black voters. A wave of constitutional conventions resulted in poll taxes, cumulative poll taxes (requiring that back taxes as well as current taxes be paid as a condition to voting), literacy tests, lengthy residence requirements, elaborate registration systems, and disfranchisement on conviction of a host of petty crimes.

These provisions had the potential to exclude poor whites as well as blacks. To protect whites, "[m]any of the disfranchising laws were designed expressly to be administered in a discriminatory fashion . . . . Small errors in registration procedures or marking ballots might or might not be ignored at the whim of election officials; taxes might be

paid easily or only with difficulty; tax receipts might or might not be issued" (p. 112).

Literacy tests permitted officials to determine whether the potential voter's "understanding" of the tested reading was adequate. Some states relied on grandfather clauses, which exempted men from the literacy, tax or other requirements if they had performed military service or if they or their ancestors had been entitled to vote before 1866. When the Supreme Court held the grandfather clause to be a palpable violation of the Fifteenth Amendment,[29] many Southern states came to rely on the whites-only Democratic Party as a means of effectively excluding blacks from politics.[30] Moreover, many Southern Democratic leaders were happy to exclude poor whites as well as blacks. "[T]he late-nineteenth-century effort to transform the South's electorate was solidly grounded in class concerns as well as racial antagonisms" (p. 114). The poll tax, the literacy tests and the other new measures could be used to produce a more "qualified" and more conservative electorate, and to weaken the political power of white Populists, small farmers, industrial workers, Republicans and other groups.[31] These measures, thus, reflected and shaped political struggles among whites, as well as the conflict between whites and blacks. Both black and white voting were sharply reduced. Immediate post-Reconstruction turnout levels of 60 to 85 percent dropped to 50 percent for whites and plummeted to single digits for blacks (p. 115).

A similar, albeit less drastic, pattern arose in the North in response to the emergence of a substantial urban industrial working class, often composed of immigrants and their children. Many old-stock Americans began to voice deep concerns about the future of American gov-

29. *See* Guinn v. United States, 238 U.S. 347 (1915); *see also* Lane v. Wilson, 307 U.S. 268 (1939). The invalidation of the grandfather clause was an unusual action by the Supreme Court to vindicate the antidiscrimination principle in voting. More commonly the Court stayed out, accepting that nonracial tests like the poll tax did not implicate the Fifteenth Amendment, and treating local restrictions on voting as essentially beyond the Court's purview. *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903); *see also* Richard H. Pildes, *Democracy, Anti-Democracy and the Canon*, 17 CONST. COMMENT. 295 (2000) (discussing the significance of *Giles* in early twentieth century voting rights jurisprudence).

30. The Supreme Court initially found that federal constitutional and statutory protection of elections or the vote applied only to general elections and not to party primaries, which were seen as "in no sense elections for an office, but merely methods by which party adherents agree upon candidates." Newberry v. United States, 256 U.S. 232, 250 (1921). The Court did find that a state law expressly disqualifying nonwhites from voting in party primaries violated the Equal Protection Clause of the Fourteenth Amendment, Nixon v. Herndon, 273 U.S. 536 (1927), but a party's decision, by party resolution, to restrict party membership and, thus, qualification to vote in party primaries, to whites, did not violate either the Fourteenth or the Fifteenth Amendment. Grovey v. Townsend, 295 U.S. 45 (1935). Only in 1944 did the Court find that the constitutional ban on racial discrimination applies to party restrictions on primary voting. Smith v. Allwright, 321 U.S. 649 (1944).

31. Many of these whites strongly resisted the disfranchising legislation. Pp. 112-13. On the other hand, many poor and lower-middle-class whites supported these suffrage exclusions. *See* p. 114.

ernment if industrial workers, particularly immigrants — seen as poor, ignorant, indifferent to American traditions, supportive of corrupt ethnic-based party machines, or committed to alien and radical beliefs — were able to use their votes to shape the political process. New franchise restrictions were justified as necessary to "purify" the electorate (p. 127) and protect against fraud.

Avoiding a direct challenge to the elimination of property tax requirements for state elections,[32] many states adopted, or authorized local adoption, of tax-payment requirements in local elections, particularly bond issues, and in some special districts.[33] More states adopted pauperage exclusions barring recipients of public aid or residents of poorhouses and charitable institutions from voting,[34] lengthened durational residency requirements (which particularly burdened mobile manual workers),[35] and, like their Southern counterparts, expanded felon disfranchisement laws.[36] The tide also turned against alien suffrage. Within a few years after World War I citizenship was everywhere a requirement for voting. Indeed, several states made it more difficult for naturalized citizens to vote, either by requiring them to present their naturalization papers to local election officials or by establishing waiting periods after naturalization before the new citizen could vote.[37]

As in the South, a significant new substantive restriction on the franchise was the literacy test. Like the property requirement of the colonial era, the literacy test could be seen as improving the quality of electoral decisionmaking by providing for educated voters and, with tests in English, increasing the likelihood voters would be familiar with American values and institutions. Unlike the property test, the literacy test was ostensibly class-neutral, although the literacy exclusion in fact tended to operate on both class and ethnic lines. For that very reason, literacy tests were strongly opposed by low-income people, the foreign-born, and the parties representing them. Although literacy tests were widespread, they were far from universal. Still, by the mid-1920s, thirteen northern and western states — which tended to be states with

32. Indeed, several states with residual property or tax requirements from the pre-Civil War era abolished those restrictions. P. 130.

33. *See* pp. 130-34.

34. *See* pp. 134-36. The pauperage exclusion could have real bite in times of class conflict. In one notorious case, striking textile workers in New Bedford, Massachusetts who "sought public relief to help tide them over months without income," were threatened with disqualification from voting. P. 135.

35. *See* pp. 146-51.

36. *See* pp. 162-63.

37. *See* p. 138.

large immigrant populations and strong Republican parties[38] — as well as eight southern states, had adopted literacy tests.

At least as important as the substantive criteria for voting were new procedures. The late nineteenth century witnessed the rapid-fire adoption of two measures — the secret ballot and pre-election day registration — which made it more difficult for poorer, working class, foreign-born and uneducated people to vote. Both the secret ballot and registration systems were intended to prevent fraud and corruption. But, as Keyssar notes, the secret ballot also operated as a de facto literacy test for illiterate voters who now had to vote on their own.[39] Registration requirements particularly burdened working people who were often unable to get to the registration office during the limited days and hours when registration was permitted, and who then had to reregister if they changed residences, even if they moved only a short distance within the same city but to a different precinct. As in the South, voter registration laws were open to administrative discretion and abuse. Many registration laws "emerged from a convergence of partisan interest with sincere concern about electoral fraud" (p. 156), as conservative, rural-dominated state legislatures at times limited registration requirements to the large immigrant-dominated cities and adopted rules aimed at urban voters.[40] In many cities, voter turnout dropped, sometimes sharply, after registration systems were adopted.[41]

The rollback of the franchise did not proceed nearly as far in the North as it did in the South. A much more competitive party system, the partial incorporation of immigrant and working class voters into the political process, and a more fluid and heterogeneous social structure resulted in a milder pattern of exclusion than the "draconian, sweeping and violent" (p. 170) actions in the South. Nevertheless, both North and South engaged in "the legal contraction of the franchise"

38. *See* p. 145. New York, with the largest immigrant population in the nation, passed a constitutional requirement instituting a literacy test in 1921. "[P]rospective voters were obliged either to pass a stringent English-language reading and writing test administered by the Board of Regents or present evidence that they had at least an eighth-grade education in an approved school." P. 145. The test effectively reduced the voting rolls; as "roughly 15 percent of all those who took the English-language literacy test between 1923 and 1929 . . . [failed] and it seems safe to assume (as did contemporaries) that many more potential voters did not take the test because they thought they had little chance of passing." P. 146.

39. *See* pp. 142-43.

40. *See* pp. 156-57. Specific registration requirements — the length of the registration period, its proximity to the date of an election, the size of registration districts, whether registration was considered "permanent" or whether the voter had to register periodically even if he hadn't moved; the necessity of documentary evidence of eligibility — varied from state to state, within states, and over time. These rules were often shaped by partisan political concerns, and in turn affected the degree to which registration requirements were serious obstacles to voting. *See* pp. 156-57.

41. *See* pp. 158-59.

(p. 170). The principal exception to this pattern of retrenchment was the Nineteenth Amendment,[42] but even the enfranchisement of women was shaped by the anti-democratic impulse of the era. Although much of the resistance to women suffrage reflected concerns about the impact of women voting on family life — it might cause divisions between husbands and wives — and on women themselves — participation in the rough and tumble of political life would topple women from the pedestal on which men sought to place them[43] — opposition was also consistent with "the generally declining faith in democracy.... To some degree... the resistance to enfranchising women was a resistance to enfranchising any new voters at all" (p. 194). Some suffragists sought to link up their cause to the class and ethnic biases of the era, arguing that votes for educated, middle class native-born white women would offset the votes of illiterate blacks and foreigners.[44] For a time many women's suffrage advocates supported literacy tests.[45] The alliance with conservative forces, however, did little to advance the vote for women. Rather, the drive for women suffrage gained significant political momentum only after it shifted to the left and linked up with the Progressives' social reform agenda and the interests of immigrants and labor.

In the end, like the propertyless after the Revolution, and blacks after the Civil War, women benefitted from a war. In 1918, President Wilson, citing the "sacrifice and suffering and toil" (p. 216) made by women for the American effort in World War I, came out strongly in favor of a federal suffrage amendment. Recognition of women's contributions to the war also proved critical to ratification. However, the provision of votes for women had little immediate impact on American politics, on thinking about the franchise, or on other voting rules.

D. *World War II and After: The Return to Democracy*

"The equilibrium in voting laws was decisively disrupted by World War II" (p. 244). The rise of totalitarianism abroad, and, especially, the racist ideology of our Nazi opponents, "spawned a popular embrace of democracy more vigorous than any that had occurred since the most optimistic moments of Reconstruction.... [T]he war against Germany and Japan (and then the cold war) led many Americans to renew their identification with democratic values" (p. 245). The tension between our democratic commitments and widespread disfran-

42. Another pro-democratic development, which Keyssar does not discuss, is the adoption of the Seventeenth Amendment, providing for the popular election of United States Senators.

43. *See* p. 191.

44. *See* pp. 190-91.

45. *See* pp. 199-200.

chisement, particularly of blacks, became a political issue. So, too, the massive mobilization of millions of adult men again raised the question of why those who were required to serve their country and risk loss of life were unable to vote. Black leaders and returning black war veterans "sought to make good on the nation's rhetorical promises" by seeking the vote.[46] "The rejections that these veterans often encountered — ranging from closed registration offices to grotesquely rigged literacy tests to violent beatings — attracted widespread national attention" (p. 250). The 1947 report of President Truman's Committee on Civil Rights found that the international interests of the United States in the Cold War were threatened by racial discrimination at home, and called for federal action to eliminate the poll tax and prevent racial discrimination in voting.

Although the President and Congress were slow to act — there would be no federal voting rights legislation for another decade — the Supreme Court struck the first significant blow by invalidating the white-only primary.[47] In the one-party South, the white primary had been a front line of defense against black political participation. The elimination of the white primary provided blacks with a greater incentive to register, and placed greater weight on — and gave greater exposure to — the literacy test, the poll tax, discriminatory registration procedures, and the intimidation of black registrants and voters. Black registration began to rise, as did black (and Northern white) pressure for federal intervention. In 1957, Congress passed the first federal civil rights law in more than eighty years, providing a legal basis for the Justice Department to participate in voting rights cases. The Civil Rights Act of 1957 and a second measure adopted in 1960 "had few teeth and little impact" (p. 260). However, by 1960 the popular campaign against voting (and other forms of) discrimination had become a mass movement, marked by sit-ins, freedom riders, marches, rallies, petitions, and widespread voter registration drives. The "growing militance of the black freedom movement" (p. 262) in turn spawned a massive, and often violent, Southern white resistance.

At the urging of President Lyndon Johnson, the federal government finally, and decisively, intervened with the Voting Rights Act of 1965, which suspended literacy and other tests; authorized the use of federal examiners to enroll voters; and, to preclude new discriminatory measures, required "covered jurisdictions" — defined by their prior use of now illegal tests plus low voter turnout — to obtain federal "preclearance" before changing their electoral rules and procedures. Subsequently amended in 1970, 1975, and 1982 — and broadened to provide, inter alia, new protections for language minorities,

46. *See* p. 250.

47. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944).

and to address voting measures that were discriminatory in effect, not just in intent — the Voting Rights Act contributed to an immediate and substantial increase in black voting. This period also witnessed the ratification of two new constitutional amendments that expanded the franchise.[48] The Twenty-fourth Amendment prohibited the use of poll taxes in federal elections.[49] The Twenty-sixth Amendment lowered the voting age — which had been twenty-one since the colonial era — to eighteen. Like so many other expansions of the franchise, it too was a response to war — in this case, the unpopular Vietnam War, and the exposure of eighteen-year-olds to the draft.[50]

But the most significant development in constitutional law was not amendments to the constitutional text but the change in the Supreme Court's jurisprudence. Before the 1960s, the Court had consistently rejected the idea of a general constitutional right to vote. The point is best illustrated by the Court's 1875 decision in *Minor v. Happersett*,[51] denying a woman's claim, under the newly-ratified Fourteenth Amendment that, as a citizen of the United States and the state of Missouri, she was entitled to vote in federal and state elections. The Court agreed she was a citizen but dismissed the idea that voting was a right of citizenship, finding that voting was a matter for state determination subject only to specific constitutional limitations, such as the Fifteenth Amendment. Although *Minor*'s holding concerning women was overturned by the Nineteenth Amendment, the Court adhered to *Minor's* approach to voting until the 1960s, upholding registration re-

48. The Twenty-third Amendment's provision for the District of Columbia to cast electoral votes in the presidential election ought to be counted in this tally as well. Interestingly, and consistent with the Constitution's general eighteenth century approach to the selection of the Electoral College, the amendment does not provide for a popular vote for the electors chosen by the District. Rather, the District's electors shall be appointed "in such manner as the Congress may direct." U.S. CONST. amend. XXIII, § 1.

49. The Twenty-fourth Amendment ultimately had little significance since two years after its ratification the Supreme Court, in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966), held unconstitutional all poll taxes, in state as well as federal elections. *See infra* text accompanying note 56.

50. *See* pp. 277-81. The path to the eighteen-year-old vote was complex. Congress initially acted by statute, tacking the lowered voting age on to the 1970 amendments to the Voting Rights Act. The measure fragmented the Supreme Court, with four justices finding that Congress had authority under the Fourteenth Amendment to lower the voting age in both federal and state elections; four justices finding that Congress had no authority to set the voting age in any elections; and Justice Black finding that Congress had authority under Article I, Section 4 of the Constitution to lower the voting age for federal but not state elections. Justice Black's opinion became the judgment of the Court. *See* Oregon v. Mitchell, 400 U.S. 112 (1970). Faced with the prospect of different voting ages for different elections, Congress immediately passed a constitutional amendment lowering the voting age for all elections, and, in "the most rapid [process] in the history of the republic," the requisite thirty-eight states quickly ratified it. P. 281.

51. 88 U.S. (1 Wall.) 162 (1874).

quirements,[52] lengthy durational residency laws,[53] the poll tax,[54] and the literacy test.[55]

In the 1960s, the Court changed direction and held voting to be a fundamental right for the purposes of the Equal Protection Clause of the Fourteenth Amendment. Applying strict scrutiny, the Court invalidated the poll tax;[56] tax payment requirements for voting in municipal bond issues[57] and school board elections;[58] and durational residency requirements longer than fifty days.[59] The Court flatly barred property ownership and tax payment requirements,[60] and indicated it would look closely and suspiciously at tests justified in terms of improving the quality of electoral decision-making.[61] The Court also upheld Congress's authority to ban literacy tests nationwide.[62]

Notwithstanding the elimination of many restrictions on voting, many observers in the 1970s and 1980s noted that turnout remained low, and they blamed the voter registration system.[63] Voting rights activists sought reforms that would remove the need for the voter to trek to an inconvenient registration office, at a specified time during the work day, and to do so again whenever he or she moved.

To address these concerns, President Clinton signed the National Voter Registration Act ("NVRA") into law in 1993.[64] The federal voter registration law required states to offer, inter alia, registration by mail, "agency registration" — that is enrollment at a variety of public facilities, including welfare offices, libraries, and motor vehicle bu-

52. Mason v. Missouri, 179 U.S. 328 (1900). Like many early registration requirements, Missouri's requirement applied only to the state's larger cities such as St. Louis, Kansas City and St. Joseph.

53. Pope v. Williams, 193 U.S. 621 (1904).

54. Breedlove v. Suttles, 302 U.S. 277 (1937).

55. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

56. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

57. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969).

58. Kramer v. Union Free Sch. Dist., 395 U.S. 621 (1969).

59. Burns v. Fortson, 410 U.S. 686 (1973); Marston v. Lewis, 410 U.S. 679 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972).

60. *Harper*, 383 U.S. at 666 ("Voter qualifications have no relation to wealth nor to paying . . . any . . . tax."). *Harper* also spelled the end of the pauperage exclusion. Within a few years these were either repealed or treated as dead letters. Pp. 271-72.

61. *See Dunn*, 405 U.S. at 354-60; *Kramer*, 395 U.S. at 631-33; Carrington v. Rash, 380 U.S. 89 (1965).

62. Oregon v. Mitchell, 400 U.S. 112, 131-34 (1970) (Black, J.); *id.* at 144-47 (Douglas, J., dissenting in part); *id.* at 216-17 (Harlan, J., dissenting in part); *id.* at 231-36 (Brennan, J., dissenting in part); *id.* at 282-84 (Stewart, J., dissenting in part).

63. *See, e.g.*, FRANCES FOX PIVEN & RICHARD CLOWARD, WHY AMERICANS DON'T VOTE (1989).

64. 42 U.S.C. § 1973gg (1994).

reaus — and "motor voter" registration, that is the attachment of registration forms to the application for a driver's license. Although the NVRA applies only to registration to vote in federal elections, the states chose to modify the rules for their own elections to avoid the cost and difficulty of maintaining separate federal and nonfederal registration systems. Within two years, the law resulted in a net addition of nine million new registrants, or about 20% of the unregistered — although there was no significant impact on voter turnout (pp. 314-15). In most states, voters are still required to register some time before election day as a precondition for voting, although a very small number of states have either eliminated registration requirements outright or permitted same day registration. But the NVRA was a "critical step in dismantling the multiple impediments" (p. 315) previously adopted. It also constituted yet another move towards the nationalization of voting requirements.

III. VOTING AS A RIGHT?

Keyssar concludes his study on the "partially happy" note that "nearly all adult citizens of the United States are legally entitled to vote" (p. 316). However, even after the plethora of constitutional amendments, federal statutes, and judicial decisions of the last several decades, we still have something less than universal suffrage. More importantly, notwithstanding the extensive focus on who can vote, which has been central to both Keyssar's study and legal analysis, we have given relatively little attention to what voting is supposed to accomplish, and what the role of voting in the political process is supposed to be.

A. *Continuing Limitations on Who Can Vote*

Despite increased access to voting, we do not yet have universal adult suffrage in the United States. Felon disenfranchisement laws, residency requirements, and a citizenship test continue to limit the number of adults eligible to vote, while our election machinery burdens the ability of legally qualified voters to actually cast their ballots and have them counted.

Currently, 4.2 million adult citizens — or about 2.1% of the voting age population — are denied the franchise on account of current or prior felony conviction. Every state but two disfranchises incarcerated felons; twenty-nine states prevent convicted felons from voting after their release from prison or jail, but while they are on parole or probation; fourteen states continue disfranchisement for some period beyond the term of incarceration, probation and parole. Eleven states disfranchise felons for life; nine for a single felony conviction. One-third of the people disqualified by a felony conviction are felons who

have completed their sentences, and more than another third are on probation or parole. Less than thirty percent are currently incarcerated.[65] According to one recent study, in those states that permanently deny felons the right to vote "the impact on the electorate is sizable," ranging from 3.2% of the voting age population in Maryland to 6.2% in Alabama and Florida.[66]

It is difficult to see how the disfranchisement of felons, particularly those who have served their time, could survive strict judicial scrutiny. The Supreme Court, however, has determined that strict scrutiny does not apply. In *Richardson v. Ramirez*[67] — decided in 1974, or after the Court had declared the vote to be a fundamental right — the Court held that the Fourteenth Amendment's provision reducing the representation in Congress of a state that denies the vote to its adult male citizens "except for participation in rebellion, or other crime" implicitly authorizes disfranchisement for conviction of a crime. Thus, a remnant of the nineteenth century vision of the vote as state-granted privilege was carried forward by the late-twentieth century Court.

The disfranchisement of convicted felons bears particularly heavily on African Americans, especially African-American men. Nationally, 6.57% of voting age blacks are disqualified by the felon exclusion. As 95% of felons are male, the felony disfranchisement rate for black men is approximately 13%. In some states, the numbers are much higher. In Florida, for example, 13.77% of voting age African Americans, and, thus, about one-quarter of voting age black men, are disqualified.[68] In *Hunter v. Underwood*,[69] the Supreme Court held unconstitutional an Alabama law, adopted as part of the general program of suffrage reduction in 1901, that disfranchised persons convicted of certain misdemeanors. Based on historical evidence, the Court found that the measure was aimed at blacks, with the misdemeanors triggering disfranchisement selected because of the assumption that those crimes were committed primarily by blacks. It is not clear if *Hunter* is limited to the use of misdemeanors. Moreover, *Hunter* relied on proof of racially discriminatory intent, and such intent will often be difficult to prove.[70] Voting rights activists have ar-

65. John Mark Hansen, Task Force on the Federal Election System, *Disfranchisement of Felons* (July 2001), *in* NATIONAL COMMISSION ON ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (Aug. 2001).

66. *Id.* at 1.

67. 418 U.S. 24 (1974).

68. *See* Hansen, *supra* note 65, at 1.

69. 471 U.S. 222 (1985); *see also* McLaughlin v. City of Canton, 947 F. Supp. 954 (S.D. Miss. 1995) (Mississippi's disfranchisement of misdemeanants violates equal protection clause).

70. *See, e.g.*, Cotton v. Fordice, 157 F.3d 388 (5th Cir. 1998) (finding that later reenactment of felon exclusion supersedes the previous provision and removes the discriminatory taint from the original Redeemer Era version).

gued that felon disfranchisement laws run afoul of the discriminatory impact test of the Voting Rights Act.[71] But the courts have been reluctant to so find.[72]

A second, even less legally controversial, prerequisite for voting is residency. The Supreme Court has indicated that a residency requirement "may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny."[73] But the effects of state and local government decisions are not limited to residents. Millions of commuters, migrant workers, and second home owners are subject to local taxation, law enforcement, and land use regulation, and depend on locally-provided public services in communities where they spend considerable time on a regular basis but are unable to vote. Moreover, in this era of easy mobility, affluence, and early retirement, with many households maintaining more than one home,[74] it is sometimes difficult to determine someone's community of residence. Both the definition of residence for voting purposes and the denial of the vote to someone with significant ties to a community because he or she is also a resident of another community are increasingly contested.[75]

Perhaps the largest group of people in the United States not entitled to vote are noncitizens. In 2000, there were approximately 28.4 million foreign born people in the United States, accounting for about 10.4% of the population. About 10.6 million, or 37% of this group, are naturalized, leaving about 18 million noncitizens, of whom about 16 million are of voting age.[76] Like other residents, aliens are subject to state and local regulation, taxation, and law enforcement, and depend

71. *See, e.g.*, Andrew L. Shapiro, Note, *Challenging Criminal Disfranchisement Under the Voting Rights Act: A New Strategy*, 103 Yale L.J. 537 (1993).

72. *See, e.g.*, Baker v. Pataki, 85 F.3d 919 (2d Cir. 1996); Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986).

73. Dunn v. Blumstein, 405 U.S. 330, 344 (1972); *accord* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 68-69 (1978) ("[O]ur cases have uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.").

74. U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY, GENERAL CHARACTERISTICS OF U.S. HOUSEHOLDS (1995) (1.8 million households, constituting 1.9 % of all households, maintain two residences as homes).

75. *See, e.g.*, Fred Bayles, *"Seasonal" Residents Fight for Expanded Rights: Having a Say vs. Having to Pay Splits Several Vacation Towns*, USA TODAY, May 23, 2000, at 6A; John Flesher, *Part-time Residents Feel Taxed by Laws*, GRAND RAPIDS PRESS, Aug. 13, 2000, at A27; Blaine Harden, *Summer Residents Want a Year-Round Voice*, N.Y. TIMES, May 30, 2000, at A1; *Part-Time Residents Seek Full-Time Say*, RECORD (Northern New Jersey), Aug. 21, 2000, at A03; *see also* CONN. GEN. STAT. ANN. § 7-6 (West 1999) (authorizing nonresident taxpayers to vote in certain local elections); May v. Town of Mountain Vill., 132 F.3d 576 (10th Cir. 1997) (upholding constitutionality of local decision to enfranchise nonresident property owners).

76. U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS: MARCH 2000, THE FOREIGN-BORN POPULATION IN THE UNITED STATES (Jan. 2001).

on states and localities for basic public services, including public safety, sanitation, and education. Whatever the possible justification, in terms of a potential conflict of national loyalties, for excluding noncitizens from participating in national governance, it seems more difficult to explain — certainly if strict judicial scrutiny is applied — the exclusion of resident aliens from voting in state and local elections.

In the past, as many as sixteen states authorized aliens to vote.[77] Indeed, the Supreme Court in *Minor v. Happersett* cited the enfranchisement of aliens as grounds for rejecting the argument that the suffrage is a right of citizenship.[78] Today, in an echo of an older tradition — before the nationalization of voting rules — in which localities often had different suffrage criteria than their states,[79] a handful of school districts permit aliens whose children are in local schools to vote in community school board elections, and at least one locality permits aliens to vote in municipal elections.[80] With these exceptions, however, resident aliens are unenfranchised, even at the state and local level. This presents no current constitutional issue. The Supreme Court has found that the "exclusion of aliens from basic governmental processes is not a deficiency in the democratic process but a necessary consequence of the community's process of political self-definition."[81] One arguably ironic consequence of the Court's new doctrine that voting is a presumptive right of adult resident citizens is the elimination of any constitutional claim to voting by noncitizens.

Apart from formal limitations on the franchise, the Florida 2000 election demonstrated to all Americans the ongoing significance of state and local administrative decisions, particularly ballot design and the selection and maintenance of voting machinery, in making the right to vote effective (or ineffective). *Bush v. Gore* simultaneously opened the door to federal constitutional review of state and local administrative decisions, and then tried to shut it by declaring that the Court's consideration was "limited to present circumstances, for the problem of equal protection in election processes generally presents many complexities."[82] The Court specifically keyed its decision to "the special instance of a statewide recount under the authority of a single state judicial officer"[83] — a relatively rare occurrence. The Court's fo-

77. *See* Table A-12.

78. 88 U.S. at 162, 177 (1874).

79. *See* pp. 6, 20-21, 30-31, 166-68, 186.

80. P. 310. Several foreign countries also permit resident aliens to vote in local elections. *See* p. 310.

81. Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982).

82. 531 U.S. 98, 109 (2000).

83. *Id.*

cus on intrastate disparities may limit the case's relevance to administrative practices that burden all voters in a state.

Nevertheless, despite the Court's effort to limit the decision's effect, *Bush v. Gore*, coupled with the national reaction to the spectacle of tens of thousands of uncounted and miscounted votes in Florida, appears to be having an impact in prodding states to upgrade their vote-counting machinery.[84] As with the elimination of property requirements in the nineteenth century, and the reform of voter registration in the late twentieth century, voting administration reform may result from political actions, or — given *Bush v. Gore* — a twenty-first century interplay of litigation and legislation. Still, until Congress and the states give serious attention (and funding) to the machinery and procedures for tabulating votes, it is likely that millions of votes will continue to be lost each election day.[85]

B. *Beyond Equality: The Substantive Meaning of the Right to Vote*

Both the historical development of the right to vote and contemporary constitutional doctrine have focused primarily on the equal availability of the vote, and equal treatment of those eligible to vote, rather than the right to vote per se. Even as the equal right to vote has expanded, the substantive meaning of the right to vote has remained undeveloped and the relationship between voting and other mechanisms that shape our political process and structure our democracy remains contested.

Thus, there is no general constitutional right to vote, that is, to have political decisions made, or political officials chosen, by popular vote. The election of members of Congress follows from specific provisions in the constitutional text. As *Bush v. Gore* has reminded us, there is no right to vote for president and vice-president. There is no federal constitutional right to vote for the governor of one's state,[86] or to have an elected local government.[87] Arguably, the republican form

84. *See* B.J. Palermo, *Suits Push Three States to End Punch-Card Voting: California Decision is the Latest Action*, NAT'L L.J., Mar. 4, 2002, at A1.

85. *See* CALTECH/MIT STUDY, *supra* note 3.

86. Fortson v. Morris, 385 U.S. 231 (1967). The Supreme Court has held, however, as a matter of statutory interpretation, that the preclearance provisions of the Voting Rights Act apply to a state's decision to convert an elected position into an appointed one. Allen v. State Bd. of Elections, 393 U.S. 544 (1969).

87. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978). Moreover, the rules of universal suffrage and one person, one vote do not apply to certain elected local governments that exercise only special, limited powers. Ball v. James, 451 U.S. 355 (1981). Such districts, including water storage districts, transportation finance districts, *see, e.g.*, So. Cal. Rapid Transit Dist. v. Bolen, 822 P.2d 875 (Cal. 1992), and business improvement districts, Kessler v. Grand Cent. Dist. Mgmt. Ass'n, Inc., 158 F.3d 92 (2d Cir. 1998), may use property ownership or tax payment criteria in determining who may vote for their governing boards.

of government secured to the states by the Guarantee Clause requires the election of state legislatures, but given the Supreme Court's unwillingness to give content to that Clause — exemplified by the nineteenth century case in which the Supreme Court refused to consider the legitimacy of actions taken by Rhode Island's limited-suffrage freeholder government against proponents of the more democratic "people's constitution"[88] — even that proposition cannot be stated with certainty.[89]

Nor, despite the Supreme Court's equation of the right to vote with the right to an equally weighted vote, is there a right to have elections decided by popular majorities. A supermajority voting requirement, in which a sufficiently large minority can block the wishes of the majority, is constitutionally valid as long as the requirement is not targeted against a distinct group.[90]

Even when voting is allowed and widely available and majority rule prevails, it may not be clear what the right to vote means. The right to vote may imply a right to have choices. The Supreme Court has held "the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."[91] Yet the Court has also held that the states can use ballot access laws to narrow voters' choices and thereby promote the two-party system and political stability, by making it difficult — but not impossible — for third parties and independents to get on the ballot.[92] Nor does the voter have the right to vote for any candidate he or she wants; or, more precisely, as the Supreme Court held in *Burdick v. Takushi*,[93] there is no right that the state "record, count and publish" individual votes.[94] *Burdick* upheld Hawaii's refusal to count

88. Luther v. Borden, 48 U.S. (7 How.) 1 (1849). *Luther* grew out of the struggle over the franchise in Rhode Island that culminated in the Dorr War; *see supra* note 23. During that conflict, two different governments — one elected under the limited-suffrage colonial era charter, and the other under a more democratic "people's constitution" — contended for power. In *Luther*, the Supreme Court refused to review the legitimacy of punitive actions taken by the charter government against those purporting to act under the people's constitution.

89. In addition, there is certainly no federal constitutional right to have decisions made by voter initiative, or subject to voter referendum, although the Constitution is not a barrier to direct democracy. *See* Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912). The Supreme Court has occasionally celebrated the democratic values of state or local measures authorizing voters to resolve legislative decisions directly through their ballots. *See, e.g.*, Vill. of Eastlake v. Forest City Enter., 426 U.S. 668 (1976); James v. Valtierra, 402 U.S. 137 (1971).

90. Gordon v. Lance, 403 U.S. 1 (1971).

91. Williams v. Rhodes, 393 U.S. 23, 31 (1968).

92. *See, e.g.*, Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997); Munro v. Socialist Workers Party, 479 U.S. 189 (1986); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971).

93. 504 U.S. 428 (1992).

94. *Id.* at 441.

write-in votes. The Court emphasized that the right to vote is not simply — or not solely — a personal right of the voter to express his or her views on electoral matters but is rather a "right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system."[95] Given the difficulties inherent in aggregating multiple individual preferences into a collective political decision "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections."[96]

Similarly, the Court has recognized that legislative apportionment implicates the right to vote and has held that districting schemes that make it more difficult for racial minorities to elect representatives violate that right.[97] But the Court has also upheld legislative gerrymanders that create large numbers of politically uncontested one-party districts if the resulting legislature roughly mirrors the strength of the two parties in the state as a whole.[98] The stability of the two-party system and political control over the structure of the political process have, thus, been treated as important constitutional values that structure and limit the right to vote.

To be sure, a state's or locality's use of structural mechanisms like multimember districts with district-wide elections that make it difficult for minority groups to win representation have been held to bear on the right to vote, and, on occasion, to be unconstitutional.[99] In other cases, however, the Court has shied away from finding a connection between the structure of an elected government, even when it bears on the ability of minorities to elect representatives, and the right to vote.[100] Moreover, our most pervasively used electoral structure — single-member districts with plurality voting rules, as opposed to multimember districts with some form of proportional representation — makes it more difficult for minorities, particularly geographically dispersed minorities, to win representation. Yet it is also constitution-

95. *Id.*

96. *Id.* at 433.

97. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960). On the other hand, districting plans that give great attention to race in order to enable racial minorities to elect representatives in proportion to their numbers may be held unconstitutional as unduly race-conscious. *See, e.g.*, Shaw v. Reno, 509 U.S. 630 (1993).

98. Gaffney v. Cummings, 412 U.S. 735 (1973); *cf.* Davis v. Bandemer, 478 U.S. 109 (1986) (gerrymandering that "consistently degrade[s]" a party's influence in the state as a whole is subject to constitutional challenge).

99. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973).

100. Holder v. Hall, 512 U.S. 874 (1994). Moreover, structural changes that reduce the decisionmaking authority of elected officials have been held not to implicate the right to vote within the meaning of the Voting Rights Act's preclearance provision. *See* Presley v. Etowah County Comm'n, 502 U.S. 491 (1992).

ally unexceptionable.[101] The right to vote has implications for the structure of government, but, just as important, the structure of government — and the constitutionally permissible preference for a less representative government — has implications for the substantive meaning of the right to vote.

The relationship between the right to vote and the financing of election campaigns is even more confused. On the one hand, the Court has found that voters have a substantive interest in learning the identities of those who donate to candidates and the amounts those donors contribute. Notwithstanding the potential infringement on freedom of speech and association, campaign reporting and disclosure laws "aid the voters in evaluating those who seek . . . office."[102] On the other hand, the norms of universal suffrage and equal treatment of voters have been held to have no bearing on the amounts of money candidates and interest groups can spend on elections.[103] The ban on wealth tests and the "one person, one vote" rule for legislative apportionment may be constitutionally required to protect the equal right to vote in elections but a governmental goal of "equalizing the relative ability of individuals and groups to influence the outcome of elections" may not justify limitations on campaign expenditures.[104]

The Court's difficulties in grappling with these issues and in resolving the connections between the right to vote and other political mechanisms are understandable since these questions present multiple, and often conflicting, legitimate concerns. As Keyssar observes, "universal suffrage is a necessary but not sufficient condition for a fully democratic political order" (p. 322). Democracy requires not just wide participation and equal treatment of voters but mechanisms for aggregating large numbers of diverse preferences into a collective result that reflects majority sentiment, respects minority interests, commands public support, and produces an effective, accountable government. A democratic commitment to near-universal suffrage and "one person, one vote" apportionment does not necessarily require easy ballot access rules, controls on gerrymandering, proportional representation of minorities, or limits on campaign spending. On the other hand, the uncertain health of American democracy today — low turnout, the widespread gerrymandering of legislative districts, the concern that the two-party system fails to represent the full range of legitimate political interests and points of view, the central role of

101. *Cf.* City of Mobile v. Bolden, 446 U.S. 55 (1980) (holding that there is no right to proportional representation).

102. Buckley v. Valeo, 424 U.S. 1, 66-67 (1976).

103. *Id.* at 49 n.55.

104. *Id.* at 48.

money in our political campaigns — suggests that our current political rules may not be the optimal ones for promoting democracy, either.

After more than two hundred years, the battles over the legal right to vote are now largely, if not quite entirely, ended. Keyssar's book provides a comprehensive account of both the extent and intensity of that struggle and the nature of its contemporary resolution. But the meaning of the right to vote and the connection between the vote and other American political institutions remain unresolved. In the near future, the political and legal battles over the vote may focus on the few remaining groups not entitled to vote and on the machinery necessary for the effective translation of the votes that are cast into votes that are counted. But critically important battles will also address those rules and structures — legislative districting, ballot access, campaign finance — that affect the choices presented to voters, and the broader question of how voter decisions are translated into political outcomes. Keyssar's study, and the multiple conflicting concerns presented by these issues, suggest that an early resolution is not likely, and that the future of American democracy is likely to be as contested as its past.

WHEN INTERESTS DIVERGE

*Robert S. Chang**
*Peter Kwan***

COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY. By *Mary L. Dudziak*. Princeton: Princeton University Press. 2000. Pp. xii, 330. $29.95.

In her recent book *Cold War Civil Rights*, Professor Mary L. Dudziak,[1] sets forth "to explore the impact of Cold War foreign affairs on U.S. civil rights reform" (p. 14). Tracing "the emergence, the development, and the decline of Cold War foreign affairs as a factor in influencing civil rights policy" (p. 17), she draws "together Cold War history and civil rights history" (pp. 14-15), two areas that are usually treated as distinct subjects of inquiry. In mixing the two together, she shows that "the borders of U.S. history are not easily maintained."[2] Perhaps it is fitting that the field of American history is not delimited neatly by its geographic borders, especially when those same borders have not contained the reach of the United States.[3] She closes the introductory section of her book by "suggest[ing] that an international perspective does not simply 'fill in' the story of American history, but changes its terms" (p. 17).

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2. P. 17. In doing this, Dudziak places her work among those historians seeking to internationalize the study of American history. P. 252; *cf.* Michael Kammen, *The Problem of American Exceptionalism: A Reconsideration*, 45 AM. Q. 1, 2 (1993) (noting the call for an internationalized historiography).

We found the claim that the terms of American history itself change provocative but not fully or explicitly developed. When Dudziak returns to this in her conclusion, she suggests that "the terms — domestic/foreign, internal/external — seem to collapse." P. 253. We would have liked to see further discussion of a transnational historical methodology and what the payoff is when the distinctions between domestic and foreign collapse. Are there consequences for the way we think about law?

3. The emergence of the United States as a colonial power in the traditional sense with extraterritorial possessions began in the late nineteenth century with the acquisition of Hawaii, Puerto Rico, and the Philippines.

Dudziak is not the first, as she herself admits, to draw a connection between foreign policy and domestic civil rights.[4] She does, however, present the most thorough and compelling case for this connection. She draws from a remarkable array of documentary evidence to construct a fascinating narrative that frames the local within the transnational.[5] For instance, Dudziak opens her book with the story of Jimmy Wilson. She tells us that Mr. Wilson's "name has not been remembered in the annals of Cold War history" (p. 3). But as a historian, she is about to help us remember.[6] The notion of "remembering" seems to serve two important functions for Dudziak. First, it helps us know who we are (pp. 17, 252-53). Second, it reminds us that we are not alone and cannot act with impunity (*passim*).

The second value of remembering is revealed through Dudziak's stressing the important role played by international actors in effecting domestic civil rights reform. To Dudziak, the international gaze serves as a panopticon.[7] She examines how local actors reacted to interna-

4. "The question of the role of the Cold War and foreign affairs in domestic civil rights reform has been noted consistently by some scholars but until recently has been at the margins of civil rights historiography." P. 258 n.26 (citing Gerald Horne, Brenda Gayle Plummer and Derrick Bell); *see also* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 64 (1988).

5. Her notes reflect a prodigious amount of archival research into State Department records and those of the United States Information Agency. Her focus on documentary evidence avoids what might be described as a great men's approach to understanding history. A year after Dudziak's book was published, Thomas Borstelmann published a book that examined similar themes. One feature of his book is the background biographical information he provides of various presidents and other important figures. THOMAS BORSTELMANN, THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA (2001). Dudziak and Borstelmann share a focus on the role that elites played. Their historical methodologies differ though in an important regard. Dudziak relies on what the elites expressed. Borstelmann attempts to get into their heads through their biographies. Dudziak, however, does a better job of showing how international affairs become part of the narrative of domestic civil rights history and how this affects the trajectory of civil rights reforms.

6. For Dudziak, history is not just what happened. She constructs what might be described as a "usable past." Michael Kammen notes that the idea of a "usable past" had become a cliché by 1969 and that the emphasis among historians had been to shift toward a respect for the " 'pastness of the past,' which means to accept the past on its own terms rather than to transmogrify it into our own contemporary frame of reference." MICHAEL KAMMEN, SELVAGES AND BIASES: THE FABRIC OF HISTORY IN AMERICAN CULTURE 116-17 (1987). Kammen notes, though, that "we ought [not] to discard entirely a judicious concern for usable pasts." *Id.* at 61. His answer to the question, "what is the good of history," reflects one way to think about a usable past:

> First, history helps us to achieve self-knowledge and thereby a clearer sense of identity. Second, it helps us to acquire moral knowledge and thereby enables us to make sensibly informed value judgments. Third, it improves our understanding of the actual relationship between past and present, as well as the potential relationship between present and future.

Id. at 55.

7. JEREMY BENTHAM, THE PANOPTICON WRITINGS (Miran Bozovic ed., 1995) (1787); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977).

tional criticisms of civil rights violations, and how pressure was brought to bear on local actors by federal officials. In this way, the international gaze operated to constrain or contain this country's racist majoritarian excesses. She posits what might be described as an extralegal theory of local and national restraint, based on some notion of national prestige and national interest.[8] We shall return to this extralegal theory of restraint at the end of this Review.

But, what is it that we should remember? What have we forgotten? What have we repressed? Professor Dudziak tells us that Jimmy Wilson was an African-American handyman "sentenced to death in Alabama for stealing less than two dollars in change."[9] She tells us about the international uproar that ensued: newspapers worldwide decried Alabama's imposition of a death sentence for what was essentially petty theft,[10] and letters and petitions from around America and the world poured in to both federal and state governmental officials (pp. 4-6). The uproar led to the involvement of Secretary of State John Foster Dulles, who sent a telegram to James Folsom, the governor of Alabama, "informing him of the great international interest in the Jimmy Wilson case" (p. 7). Governor Folsom himself had been receiving an average of a thousand letters per day, and he already knew about the great international interest. Thus, when the Alabama Supreme Court upheld Wilson's conviction and sentence, Governor Folsom quickly granted Wilson clemency.

As the opening narrative to her book, Jimmy Wilson creates the frame for Dudziak's analysis. "[D]omestic civil rights crises would quickly become international crises. As presidents and secretaries of state from 1946 to the mid-1960s worried about the impact of race discrimination on U.S. prestige abroad, civil rights reform came to be seen as crucial to U.S. foreign relations" (p. 6). Professor Dudziak organizes her book chronologically, with civil rights crises and government responses serving as episodes that repeat the basic arc of the Jimmy Wilson story. The ad hoc nature of the governmental response to each crisis demonstrates that there was no sustained or coherent positive federal policy with regard to civil rights other than crisis man-

8. This is a variation on Derrick Bell's interest-convergence hypothesis. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

9. P. 3. Although the death sentence was permissible for robbery, it is unlikely that the robbery was the "real" basis for his being sentenced to death. His employer, a white woman, told the police that "he forced her onto the bed and unsuccessfully attempted to rape her." P. 4. Although Wilson was "prosecuted only for robbery," his employer was permitted to testify "at trial about the alleged sexual assault." P. 4.

10. P. 4. The sexual aspect of the case seems to have been overlooked by the international papers, and Dudziak does not address further the way the death sentence was a quasi-legal lynching in response to the alleged sexual transgression of the color line, or how that story did or did not make it into the international understanding of the case.

agement or image maintenance.[11] The concern of presidents and secretaries of state during the period she examines is not so much about racial justice but rather the harm to U.S. prestige abroad and the concomitant effect on U.S. foreign policy objectives.

The themes of crisis management and image maintenance are developed in Chapters One and Two of the book. The crisis that begins Chapter One is the ritualized killing of George and Mae Murray Dorsey and Roger and Dorothy Malcolm. Dudziak tells us: "One shot could have killed George Dorsey, but when he and three companions were found along the banks of the Appalachee River in Georgia on July 25, 1946, their bodies were riddled with at least sixty bullets" (p. 18). The four were lined up by a group of white men who fired three volleys, leaving "the upper parts of the bodies . . . scarcely recognizable because of the mass of bullet holes" (p. 19). As horrific as the killings were, Dudziak tells us that the crime was unremarkable, the pattern, familiar: "African American man detained by police, then released, then killed with companions by a white mob" (p. 19). What made these killings different "was not their brutality," but the attention that was paid to the deaths (p. 19). One factor that may have led to the heightened attention was that George Dorsey had just served five years in the United States Army.[12]

In addition to domestic uproar, including protests in front of the White House, overseas papers covered the murders and the ensuing investigation (pp. 20-24). The domestic and international attention placed pressure upon the administration to take action (p. 25). The action to be taken was understood as part of the nation's Cold War imperatives and the role the United States was to play. In an important speech to a joint session of Congress, Truman stated: "The free peoples of the world look to us for support in maintaining their freedoms. If we falter in our leadership, we may endanger the peace of the world

11. *See infra* text accompanying notes 13-14.

12. P. 18. Another violent incident from that same summer also involved a former U.S. serviceman, Sergeant Isaac Woodard, an African American who was blinded in both eyes by the chief of police of Aiken, South Carolina. The white police chief was indicted but was ultimately acquitted "to the cheers of a crowded courtroom." P. 23. This incident in particular seems to have left its mark on Truman. In private correspondence, when an old friend urged "him to moderate his position on civil rights," Truman responded:

> When a Mayor and a City Marshall can take a Negro Sergeant off a bus in South Carolina, beat him up and put out one of his eyes, and nothing is done about it by the State Authorities, something is radically wrong with the system . . . . I can't approve of such goings on and I shall never approve of it, as long as I am here . . . I am going to try to remedy it and if that ends up in my failure to be reelected, that failure will be in a good cause.

P. 24. While not questioning Truman's commitment to civil rights for racial minorities, Dudziak does note that "Truman's sensibilities on race were mixed . . . [and he would] use racist language in private when referring to African Americans." P. 24.

— and we shall surely endanger the welfare of the Nation."[13] Part of the leadership thought to be required was addressing the racial injustices in the United States that jeopardized its foreign policy objectives.

As a stopgap measure, recognizing that meaningful racial reform would take time, the administration resolved to take greater efforts at controlling America's image abroad. Dudziak, in her second chapter, tells a fascinating account about the United States Information Agency's ("USIA") efforts to contextualize the nation's race problems. The USIA created a pamphlet, *The Negro in American Life*, that revealed, rather than concealed the nation's past failings, and it did so for the purpose of presenting American history as a story of redemption. "In this story, democracy as a system of government was the vehicle for national reconciliation . . . . Democracy, not totalitarian forms of government, it argued, provided a context that made reconciliation and redemption possible" (p. 49).

This chapter also recounts the length to which the U.S. government went to control the voices of those it thought were hurting its image. Critics of U.S. race relations, including Paul Robeson, W.E.B. Du Bois and Josephine Baker "found that their ability to travel overseas was curtailed in the early 1950s" (p. 61). In addition, the U.S. State Department sponsored African Americans to travel abroad who would speak favorably about U.S. race relations to foster a favorable image of American democracy (p. 56).

One problem with trying to construct a positive image of U.S. race relations is that it will only have limited efficacy if it does not bear some reasonable relation to reality. Dudziak, in Chapter Three, discusses some positive efforts at civil rights reform undertaken by the administration in part to give the State Department and its overseas American embassies more to work with (p. 79). The battle over school desegregation is the focal point of this chapter and the next.

The civil rights victories that Dudziak describes in these two chapters, while important substantively and symbolically, end up falling short of achieving actual desegregation. This failure is reflective of the relatively shallow commitment the administration had toward real civil rights reform. Instead, once it had achieved the pronouncement in *Brown v. Board of Education* and publicly demonstrated its commitment to desegregation by sending in federal troops to Little Rock, Arkansas,

> [Eisenhower] and his administration withdrew their presence from the continuing struggle . . . . At this juncture, the Cold War imperative could be addressed largely through formal pronouncements about the law. More substantive social change would await another day. (p. 159)

13. P. 27 (quoting Harry S. Truman, *Special Message to the Congress on Greece and Turkey: The Truman Doctrine, Mar. 12, 1947, in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, HARRY S. TRUMAN, 1947 (1963).

Once the primary interests of the federal government were satisfied, the dream of African Americans to achieve substantive educational equality and opportunity would be deferred.

Mary Dudziak's work provides a wonderful complement to Derrick Bell's. In a series of law review articles, Bell articulated what he called the interest-convergence principle — the idea that:

> [The] interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites . . . . Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.[14]

The implications of this principle, if true, are far-reaching since the corollary of the principle is that where the judiciary perceives that interests of the white middle and upper class diverge from those of African Americans, they will not be willing to grant racial remedies to African Americans. Subsequent legal scholars have extended this principle from the judiciary to the white power elites, and from African-American interests to the interests of other minority and disempowered groups.[15] Taken to its logical conclusion, Bell's Interest Convergence principle is a call to action on the part of those who desire progressive social change to raise awareness among white elites that their interests and the interests of minorities converge, and perhaps even to undertake action to create the conditions where the white elites must act to preserve peace as well as their position in the status quo.

Dudziak does a remarkable job of demonstrating through historical evidence a story that runs counter to the standard narrative of racial sin followed by racial redemption. This history that Dudziak recounts is critical in the sense used by Robert Gordon:

> any approach to the past that produces disturbances in the field — that inverts or scrambles familiar narratives of stasis, recovery or progress; anything that advances rival perspectives (such of those as the losers rather than the winners) for surveying developments, or that posits alternative trajectories that might have produced a very different present —

14. Bell, *supra* note 8, at 523.

15. *See, e.g.*, Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273 (1996); Neil Gotanda, *Towards Repeal of Asian Exclusion*, *in* ASIAN AMERICANS AND CONGRESS: A DOCUMENTARY HISTORY 309 (Hyung-chan Kim ed., 1995); John Hayakawa Torok, *"Interest Convergence" and the Liberalization of Discriminatory Immigration and Naturalization Laws Affecting Asians, 1943-65*, *in* CHINESE AMERICA: HISTORY AND PERSPECTIVES 1 (1995).

> in short any approach that unsettles the familiar strategies that we use to tame the past in order to normalize the present.[16]

Dudziak's critical history requires us to reassess who we are. A belief that racial redemption has been achieved allows us to feel good about ourselves and to believe that we have achieved our colorblind destiny. Her history requires us to confront the material and structural inequality that has persisted and reminds us that much work remains to be done.

But what is the work to be done? And how do we go about doing it?

The last chapter documents the declining influence of Cold War foreign affairs on domestic civil rights. This chapter could have been developed further. She argues that the Vietnam War shifted the terms of the foreign policy debate. This seems right, and Dudziak identifies two possible pathways for this shift. The first is that elites may have concluded that discriminatory treatment of African Americans no longer had a negative impact on U.S. foreign policy objectives.

The second is that the Vietnam War simply shifted the international gaze away from U.S. domestic race relations to U.S. overseas military actions. Dudziak notes a 1966 USIA report stating that: "*Awareness of and disapproval of treatment of the Negro seem to have comparatively little effect on general opinion of the U.S.*"[17] This raised the question: "*Does the racial issue as a propaganda problem preoccupy us more than the facts warrant?* The answer seems to be, probably *Yes*" (p. 241). If advocating for domestic racial reform was perceived as no longer having a payoff in foreign affairs, then there is interest-divergence, which might explain the shift in the State Department's role with regard to domestic civil rights.

The Vietnam War, however, seems to be an example of interest-distraction. It shifted the international gaze to overseas U.S. military action — it also seems to have shifted some of the energy of domestic protest groups to the peace movement. All of this, though, feeds back into interest divergence.

Professor Dudziak's conclusions are not quite as sweeping or forceful as Professor Bell's. This is probably because she is writing as a historian. Bell makes the argument for causation. Dudziak, as a historian, writes about causes and influences. As one reviewer noted, "[o]f course, to say that Cold War foreign affairs played a role in U.S. civil rights reform does not tell us much about its *relative* influence as compared with other influences, a difficult if not impossible empirical

16. Robert W. Gordon, *Foreword: The Arrival of Critical Historicism*, 49 STAN. L. REV. 1023, 1024 (1997).

17. P. 240 (quoting OFFICE OF RESEARCH, UNITED STATES INFORMATION AGENCY, RACIAL ISSUES IN THE U.S.: SOME POLICY AND PROGRAM INDICATIONS OF RESEARCH, Special "S" Reports, 1964-82, S-3-66 (Mar. 14, 1966)).

question."[18] And Dudziak, in writing about causes and influences, has done an excellent job of culling sources and weaving a coherent narrative that does exactly what she set out to do. The book "traces the emergence, the development, and the decline of Cold War foreign affairs as a factor in influencing civil rights policy" (p. 17).

We should be careful, though, to note the normative dimension to her work. Dudziak constructs a narrative about the past that is surely meant to have present day implications. Earlier, we suggested that she was positing an extralegal theory of restraint whereby the actions of local and federal officials are limited by the international gaze. Dudziak opens the concluding paragraph of her book with the following: "The international critique has been persistent. What has changed is the perception of whether it has strategic importance. In the absence of immediate strategic advantages there remains, however, the ever-present international gaze, and the questions of new generations about the nature of American democracy" (p. 254). On the previous page, she states:

> But under an international gaze, government power itself is subject to restraint. Internationalizing American history, then, helps us reconfigure our understanding of the boundaries of state power. State power is affected by the mirror of international criticism. Its autonomy over "domestic" matters is limited by its role in the world. (p. 253)

This normative dimension is suggested but not developed fully. It suggests further avenues of inquiry for other scholars who will build on her work: why should the United States care about the international gaze? In what way does it limit state power? If the international critique has been persistent, why aren't things better for America's racial minorities? Is the international critique impotent if the power elite do not believe that it serves the national self-interest to be responsive to international concerns? Will this depend on the "new generations" that she refers to? If we want to influence the "new generations" to care about national prestige, but we do not give it a moral grounding, how do we articulate it as being in their self-interest? And what happens when the old generations are slow to relinquish power to the new generations?

These questions are especially important now as we enter into what some have termed a new kind of cold war, where the enemy is terror. Some commentators have written about a new ideological or cultural or religious iron curtain.[19] It's possible that the Cold War's in-

18. Curtis A. Bradley, *Foreign Affairs and Domestic Reform*, 87 VA. L. REV. 1475, 1476 (2001) (reviewing *Cold War Civil Rights*).

19. *See, e.g.*, Thomas L. Friedman, *U.S. Truth is not Universal*, TIMES UNION (Albany), Jan. 23, 2002, at A11, *available at* 2002 WL 8886776; *Key U.S. Senator Calls for Reassessment of U.S. Policy Toward Islamic World*, AGENCE-FRANCE PRESS, Jan. 15, 2002, *available at* 2002 WL 2316799.

fluence on domestic race relations was an accident of history. But even accidents can teach us. For those who would work to protect human rights, how can the international and domestic gaze be directed to limit the exercise of state power? One example comes from Japanese-American communities who have called on the collective memory of World War II internment to check this nation's behavior with regard to persons of Middle Eastern and South Asian ancestry. We must use our imagination to think of other ways to remind elites that we are watching.

We have Professor Mary Dudziak to thank for narrating to us her vision of a past that may be used today and in the future. This is an important book that has and will continue to receive much attention.

CONTRACT RIGHTS AND CIVIL RIGHTS

*Davison M. Douglas**

ONLY ONE PLACE OF REDRESS: AFRICAN-AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL. By *David E. Bernstein.* Durham: Duke University Press. 2001. Pp. xiii, 191. $39.95.

Have African Americans fared better under a scheme of freedom of contract or of government regulation of private employment relationships? Have court decisions striking down regulation of employment contracts on liberty of contract grounds aided black interests? Many contemporary observers, although with some notable dissenters, would respond that government regulation of freedom of contract, particularly the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964, has benefited African Americans because it has restrained discriminatory conduct by private employers.[1]

Professor David E. Bernstein[2] challenges the view that abrogation of freedom of contract has consistently benefited African Americans by examining government regulation of the workplace during the period from Reconstruction to the New Deal. Bernstein argues that "for most of the period after Reconstruction and before the modern civil rights era African Americans were better off with free labor markets than with federal regulation" (p. 105). Bernstein further argues that African Americans benefited from court decisions striking down some of these labor regulations. With this latter argument, Bernstein

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1. *See, e.g.*, James Heckman & Brook S. Payner, *Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina*, 79 AM. ECON. REV. 138, 173-74 (1989) (finding positive correlation between enactment of Title VII and expansion of black employment in textile industry); James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL'Y REV. 276, 279 (1990) (suggesting, with qualifications, that the "available evidence broadly supports the hypothesis that federal [antidiscrimination] law improved black relative wages and occupational status"). *But see* RICHARD EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 246-51 (1992) (finding improvement in black employment due to end of state laws mandating segregation).

2. Associate Professor of Law, George Mason University School of Law.

seeks to bolster the much maligned "Lochnerian jurisprudence,"[3] pursuant to which many courts during the early twentieth century declared a variety of regulatory statutes unconstitutional on liberty of contract grounds. Noting that some scholars have argued that *Lochner*-era decisions benefited the powerful at the expense of the powerless (p. 4), Bernstein claims that those decisions striking down government regulation in defense of freedom of contract frequently aided black interests.

Bernstein has provided us with an important narrative that is underappreciated in African-American history. Historians of the declining status of African Americans during the late nineteenth and early twentieth centuries have tended to focus on the racial animus of private actors and government actions such as segregation laws, disfranchisement, and grossly underfunded black schools. Although some historians have previously noted the efforts of southern state legislatures to control black labor through vagrancy laws, convict leasing laws, emigrant agent laws, contract enforcement laws, and enticement laws,[4] and the anti-black sentiment of many labor unions,[5] Bernstein's book is a useful compilation of the ways in which certain governmental actions adversely affected black employment opportunities during the Reconstruction to New Deal period.

The more provocative parts of Bernstein's book, however, are those in which he uses his historical narrative of the Reconstruction to New Deal era to address the larger implications of government regulation of private market relationships on the lives of racial minorities, and judicial decisions holding such regulation unconstitutional on freedom of contract grounds. Here, Bernstein displays a certain ambivalence. On the one hand, he is careful to note that he is not arguing that "over the longer run African Americans would have benefited disproportionately from economic laissez-faire" (p. 113). Indeed, Bernstein suggests, once African Americans gained political influence, particularly after the enfranchisement of many southern blacks fol-

3. Bernstein defines "Lochnerian jurisprudence" as the liberty of contract jurisprudence associated most prominently with the Supreme Court's decision in *Lochner v. New York*, 198 U.S. 45 (1905). P. 2.

4. *See, e.g.*, WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL, 1861-1915 (1991); PETE DANIEL, THE SHADOW OF SLAVERY: PEONAGE IN THE SOUTH, 1901-1969 (1972).

5. In recent years, labor historians have placed considerable emphasis on the exclusion of black workers from the union movement and the labor market during the Reconstruction to New Deal time period. *See, e.g.*, ERIC ARNESEN, BROTHERHOODS OF COLOR: BLACK RAILROAD WORKERS AND THE STRUGGLE FOR EQUALITY (2001); JAMES GROSSMAN, LAND OF HOPE: CHICAGO, BLACK SOUTHERNERS, AND THE GREAT MIGRATION (1989); BRUCE NELSON, DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY (2001); Nell Irvin Painter, *Black Workers from Reconstruction to the Great Depression*, *in* WORKING FOR DEMOCRACY: AMERICAN WORKERS FROM THE REVOLUTION TO THE PRESENT 63-71 (Paul Buhle & Alan Dawley eds., 1985).

lowing passage of the Voting Rights Act of 1965, they may have benefited "disproportionately from state action" since they are a "discrete, identifiable, and relatively well-organized group, the type of group that public choice theory suggests often gains disproportionately from collective political action" (p. 114).

On the other hand, Bernstein seems to favor the protection of civil rights of racial minorities through freedom of contract rather than government regulation:

> [G]iven the post-World War II historical trends favoring equal rights for African Americans . . . one can imagine that but for the interruption of the Great Depression and the New Deal, and the concomitant demise of classical liberalism as a vital American ideology, entirely different forms of civil rights protections could have arisen. Civil rights protections could have been of the sort envisioned by Reconstruction-era Radical Republicans, including Frederick Douglass: a classical liberal combination of equal protection of the law/prohibitions on class legislation, liberty of contract and free labor markets, and freedom of association. (p. 109)

Although Bernstein concedes that his freedom of contract model of civil rights protection would not necessarily "obligate the state to eradicate discrimination, or to guarantee 'equal opportunity' " (p. 110), he nevertheless argues that "unlike the modern [regulatory] regime [for protecting civil rights], the classical liberal vision does not depend on granting the government massive regulatory powers, and hoping, despite a wealth of contrary historical experience from the United States and abroad, that those powers will never be grossly abused" (p. 110).

Bernstein has written an engaging book that expands our understanding of the ways in which anti-black sentiment contributed to certain types of state regulation that affected African-American employment opportunities in the late nineteenth and early twentieth centuries. Part I of this Review considers various forms of government regulation of the workplace during the Reconstruction to New Deal era that Bernstein believes harmed black workers. Bernstein is convincing in arguing that some of this regulation did harm black economic opportunities. But in a few particulars, he both overstates the effect of this labor market regulation on black economic opportunities and understates the effect of other factors such as grossly unequal funding for education, widespread poverty resulting from generations of enslavement, and the pervasiveness — North and South — of anti-black sentiment among both workers and bosses.

Part II of this Review considers Bernstein's larger thesis that Lochnerian jurisprudence protected black interests during the period from Reconstruction to the New Deal and that the demise of *Lochner* harmed African Americans. A few Lochnerian decisions did benefit

blacks,[6] but many others caused harm and perpetuated racial segregation and discrimination.[7] Although Bernstein argues that Lochnerian jurisprudence "lasted far too short a time" (p. 7) to adequately protect black interests, in fact, freedom of contract ideology faded in time to allow government regulations forbidding racial discrimination in employment, first in the 1940s and then in the 1960s, to withstand judicial scrutiny.

I. GOVERNMENT REGULATION OF LABOR RELATIONS FROM RECONSTRUCTION TO THE NEW DEAL

Bernstein describes his book as a consideration of various "facially neutral occupational regulations passed between the 1870s and 1930s [that] harmed African American workers" (p. 5). These regulations included emigrant agent laws, licensing laws, and various statutes that provided a variety of benefits to labor unions. Bernstein argues that each of these regulations operated in a manner that harmed black interests. But the effect of these laws on black workers is less clear than Bernstein suggests.

A. *Emigrant Agent Laws*

One of the issues confronting southern planters in the wake of emancipation was how to retain low-cost labor, particularly in the face of black mobility. Southern states employed a variety of devices during the late nineteenth and early twentieth centuries to control this mobility: vagrancy laws that essentially criminalized unemployment; a convict lease system that forced those convicted of even minor offenses to agree to lengthy and arduous employment contracts; enticement laws that made it a crime, not a tort, to hire someone under contract with another employer; and emigrant agent laws that restricted the activities of labor agents through hefty licensing fees.[8] Bernstein opens his book with a consideration of emigrant agent laws.

Labor agents performed two roles for workers: they provided information about distant jobs, and they sometimes paid travel costs to facilitate a worker's move to a new job. Labor agents could also provide guarantees of employment that allowed a worker to avoid a vagrancy charge while moving to a new locale. This facilitation of relocation proved crucial to black interests because migration functioned as an important method for southern black workers to secure more advantageous employment opportunities.

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6. *See, e.g.*, Buchanan v. Warley, 245 U.S. 60 (1917) (striking down local ordinance mandating residential segregation).

7. *See infra* notes 39-64 and accompanying text.

8. P. 10. *See generally* COHEN, *supra* note 4.

Beginning in the 1870s, several southern states attempted to limit black mobility by enacting laws imposing substantial license fees on labor agents engaged in the recruitment of workers for out-of-state jobs. State supreme courts divided on the question of whether these laws offended the Constitution.[9] Following the United States Supreme Court's 1900 decision in *Williams v. Fears*[10] upholding Georgia's emigrant agent law against a claim that it violated freedom of contract, several additional southern states enacted similar emigrant agent laws. Moreover, the "Great Migration" of southern blacks northward during World War I provoked additional southern states to enact emigrant agent legislation (p. 25).

What effect did these emigrant agent laws and the Court's decision in the *Williams* case holding Georgia's law constitutional have on African-American mobility? In an earlier article from which this chapter of his book is drawn, Bernstein asserts that the *Williams* case "negatively affected the lives of millions of African-Americans,"[11] but he does not repeat this claim in the book. Bernstein argues that economic theory suggests that emigrant agent laws harmed blacks, but he concedes, as he must, that the effects of these laws are "nearly impossible" to quantify (pp. 25-26).

In fact, hundreds of thousands of southern blacks migrated both northward and to other parts of the South despite the 1900 *Williams* decision and the subsequent enactment of new emigrant agent laws (pp. 25-26), suggesting that these laws did not have a dramatic effect on black mobility. Indeed, more southern blacks moved northward during the decade after *Williams* than did so during the decade prior to the decision, and those migration numbers exploded during the 1910s.[12] Bernstein concludes this chapter with the claim that "the history of emigrant agent laws . . . provides an excellent example of how Lochnerian jurisprudence, when applied, aided African Americans" (p. 27). But he is unable to demonstrate that the two nineteenth century state supreme court decisions that struck down these laws[13] had any effect on patterns of black migration.

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9. Joseph v. Randolph, 71 Ala. 499 (1882) (striking down emigrant agent law); Shepperd v. County Comm'rs of Sumter, 59 Ga. 535 (1877) (upholding emigrant agent law); State v. Moore, 18 S.E. 342 (N.C. 1893) (striking down emigrant agent law).

10. 179 U.S. 270 (1900).

11. David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEXAS L. REV. 781, 781 (1998).

12. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 28-29 (1993) (during the 1890s, 174,000 blacks left the South; during the 1900s, 197,000; during the 1910s, 525,000).

13. *See supra* note 9.

B. *Licensing Laws*

Many jobs in the late nineteenth and early twentieth centuries were subjected to licensing requirements. Bernstein argues that these requirements, sometimes enacted at the urging of the regulated profession so as to reduce competition, operated to the disadvantage of black workers. Bernstein explores licensing laws in three primary fields: plumbers, barbers, and physicians. With respect to plumbers and barbers, Bernstein argues that in some parts of the nation, licensing laws were used either to exclude African Americans or to force them to work without a license, which restricted their employment options (pp. 34-41). As Bernstein notes, *Lochner*-era courts generally upheld these various licensing restrictions against freedom of contract challenges, finding that the public nature of this type of work justified the licensing requirements as a proper exercise of the state's police power (pp. 30-31).

These licensing requirements probably did have an adverse impact on black workers, but the actual effect cannot be precisely delineated, especially given the fact that many blacks, as Bernstein notes (pp. 35-36), continued to work without a license. Bernstein argues, for example, that after the Ohio Supreme Court upheld that state's licensing requirement for plumbers in 1898, the plumbers' union used the licensing process to exclude black plumbers (p. 34). But according to the relevant census data, the total number of black plumbers and the percentage of plumbers who were black steadily increased in Ohio between 1900 and 1920, suggesting that the effect of the licensing requirements may have been less dramatic than Bernstein suggests. Similar increases in the number and percentage of black plumbers took place in both Illinois and New York following court decisions in those states in the late nineteenth and early twentieth centuries legitimating licensing requirements.[14]

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14. BUREAU OF THE CENSUS, SPECIAL REPORTS: OCCUPATIONS AT THE TWELFTH CENSUS 264, 348, 362 (1904); BUREAU OF THE CENSUS, 4 THIRTEENTH CENSUS OF THE UNITED STATES: POPULATION 1910, at 453, 495, 503 (1914); BUREAU OF THE CENSUS, 4 FOURTEENTH CENSUS OF THE UNITED STATES: POPULATION 1920, at 911, 981, 993 (1923). Admittedly, census data captures only those who self-identify as plumbers and does not report employment levels; hence this census data likely understates the actual effect of the licensing requirements on black workers.

But a 1980 econometric analysis of the effect of licensure laws on black employment in various trades, including plumbers, between 1890 and 1960 found that the licensing laws in four nonsouthern states (Illinois, New York, Ohio, and Pennsylvania) "had little or no impact on the relative penetration of blacks into the crafts." Richard B. Freeman, *The Effect of Occupational Licensure on Black Occupational Attainment*, *in* OCCUPATIONAL LICENSURE AND REGULATION 169 (Simon Rottenberg ed., 1980).

Ironically, in some northern communities, blacks tried to use licensing restrictions to prohibit racial discrimination in public accommodations. For example, Chicago Alderman Oscar De Priest sought passage of a local ordinance granting the mayor the right to revoke the license of any business that engaged in racial discrimination. ALLAN H. SPEAR, BLACK CHICAGO: THE MAKING OF A NEGRO GHETTO 1890-1920, at 207 (1967). But De Priest's

Bernstein also notes that in the medical field, state licensing officials after 1910 deemed many medical schools that trained black students unsuitable and hastened their closure. Bernstein argues that these measures restricted black access to the medical profession, which they may have done, although the percentage of doctors who were black continued to increase during the decade following these closures.[15]

C. *Pro-Union Legislation*

During the 1920s and 1930s, Congress and some state legislatures enacted a variety of laws that favored labor unions. Bernstein devotes one chapter to legislation favoring railway unions, another chapter to prevailing wage laws favoring construction unions, and a final chapter to a variety of New Deal labor laws that benefited unionized workers. Bernstein argues that because many unions — particularly those in the railway and construction industries — either excluded blacks from membership or engaged in other forms of racially discriminatory behavior, this pro-union legislation, though facially neutral, had the effect of harming black employment opportunities.

In fact, racial animus was widespread in many labor unions during the first half of the twentieth century[16] and thus laws that improved the status of unions did have an adverse effect on black workers. As will be discussed below, however, it is exceedingly difficult to quantify the effect of pro-union legislation on black workers given the array of other factors that hampered black employment efforts. Black workers confronted a variety of barriers to work in addition to union animus, most prominently employer racial animus and inferior educational opportunities. Moreover, pro-union labor laws did not always harm black workers. Such laws benefited both blacks who were permitted to join unions (such as the United Mine Workers) on a nondiscriminatory basis as well as blacks who used picketing and boycotts to challenge racial discrimination by private employers outside the union context.

As Bernstein notes, in the late nineteenth and early twentieth centuries, most railroad unions, which were notoriously racist, discrimi-

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efforts to use government regulation to abrogate freedom of contract in a manner that benefited blacks failed. *Id.*

15. Bernstein, citing the effect of the medical school closures, claims that "after 1910, the percentage of African American doctors . . . leveled off." P. 44. But according to the 1910 census, there were 3,077 black doctors in the country, 2.0% of the total; by 1920, there were 3,495 black doctors, 2.4% of the total. BUREAU OF THE CENSUS, 4 THIRTEENTH CENSUS OF THE UNITED STATES: POPULATION 1910, at 428-29 (1914); BUREAU OF THE CENSUS, 4 FOURTEENTH CENSUS OF THE UNITED STATES: POPULATION 1920, at 356-57 (1923). These numbers probably would have been higher absent the medical school closures.

16. *See* sources cited *supra* note 5.

nated against or excluded black workers from the better paying skilled jobs in the railroad industry.[17] Labor unions sought a variety of forms of government regulation to facilitate their exclusion of black workers and to expand work opportunities for their white members. State "full crew" laws, which required railroads to operate with an engineer, fireman, conductor, brakeman, and flagman, harmed blacks, since many black porters had unofficially performed the brakeman's job in addition to their own work. With the passage of these laws, many black porters lost their jobs (pp. 52-53). In 1926 Congress enacted the Railway Labor Act, which extended both collective bargaining and exclusive representation rights to racially exclusionary railway unions, thereby further harming the interests of some black rail workers.

Discrimination against black workers was also extensive in the construction trades, as blacks were excluded from many construction unions. As Bernstein notes, in 1931, Congress strengthened the hand of these discriminatory unions by enacting the Davis-Bacon Act, which required federal contractors to pay workers on public works projects the "prevailing wage," which was subsequently deemed to connote a union wage (pp. 73-79). This statute, which significantly raised wages on federal construction projects, caused many federal contractors to stop hiring low-cost (and lesser skilled) black workers in favor of unionized white workers (p. 80). Prior to the Davis-Bacon Act, the willingness of non-union black workers to work for less than a union wage led to substantial work opportunities. "Prevailing wage" legislation undermined that advantage (p. 79). Although the dearth of black workers in the construction industry cannot be attributed solely to the Davis-Bacon Act, which was limited in application to federal public works projects, it undoubtedly harmed low-wage, non-union, black construction workers who might otherwise have secured work on such projects (pp. 79-81).

During the 1930s, Congress extended the collective bargaining and exclusive representation rights of labor unions. The National Recovery Act ("NRA") granted exclusive representation rights to labor unions in many industries. Although the NRA was short-lived, in 1935 Congress enacted the National Labor Relations Act ("NLRA"), which further guaranteed the right of workers to engage in collective bargaining and concerted action and granted labor unions exclusive representation rights. Both the NRA and the NLRA aided black workers in industries where unions accepted black members on a nondiscriminatory basis,[18] but because most labor unions discriminated against

17. ARNESEN, *supra* note 5, at 5-83.

18. The United Mine Workers, for example, did not, for the most part, discriminate against black workers. RONALD L. LEWIS, BLACK COAL MINERS IN AMERICA: RACE, CLASS, AND COMMUNITY CONFLICT 1780-1980, at 101 (1987).

black workers, both Acts weakened the position of most black workers who sought work in unionized industries.

Other aspects of New Deal labor legislation also had a negative effect on black workers. The short-lived NRA provided for an increase in wage rates. This adversely affected black workers as many employers chose to discharge their least skilled employees, who were frequently black, in lieu of paying the mandated minimum wage (pp. 87-89). The same principle applied when Congress established a national minimum wage through the 1938 enactment of the Fair Labor Standards Act ("FLSA"). In the South, the new FLSA-mandated minimum wage caused a sharp increase in prevailing wages, resulting in significant unemployment for unskilled workers, many of whom were black (pp. 99-102). Labor unions enthusiastically supported this minimum wage legislation because it tended to narrow the gap between union and non-union wages, thereby undermining the competitive wage advantage enjoyed by non-union workers (pp. 100-02).

D. *The Effect of Pro-Union Legislation*

What impact did this pro-union labor legislation have on black workers? Bernstein, in an earlier article, suggests that had courts struck down legislation favoring unions during the 1930s, such action could have kept "hundreds of thousands, perhaps millions of blacks from being permanently deprived of their livelihoods."[19]

That assessment seems overstated and difficult to support.[20] Certainly the anti-black sentiment of many labor unions, such as the railroad and construction unions, coupled with federal legislation strengthening the power of those unions, harmed black workers in those industries. But disentangling the effects of this labor regulation from other factors such as poor education,[21] widespread black poverty,

19. David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 87 (1993).

20. Bernstein appears to have modified that earlier claim in his book:

> One should not leap . . . to the conclusion that labor market regulations were primarily responsible for African Americans' economic plight. The social and economic disadvantages resulting from slavery undoubtedly lingered for generations. State violence and state refusal to protect African Americans from private violence inhibited African Americans' economic success, as did other forms of state action and inaction that affected the labor market, such as gross inequality in the provision of state publicly funded education.

P. 113.

By the same token, Bernstein blames current high black unemployment on New Deal policies, pp. 103-05, and characterizes his book as a corrective to the view that "the economic subjugation of African Americans between Reconstruction and the modern civil rights era primarily resulted from irrational private discrimination and social custom in a free market environment." P. 111.

21. *See, e.g.*, JOE W. TROTTER, JR., COAL, CLASS, AND COLOR: BLACKS IN SOUTHERN WEST VIRGINIA 1915-32, at 103 (1990) (noting that the lack of blacks in managerial jobs in

racial violence,[22] and widespread anti-black sentiment among employers and other whites[23] is extraordinarily difficult.

For example, many employers, particularly in the South, home to the overwhelming majority of black workers during the Reconstruction to New Deal era, were notoriously anti-black and engaged in open discrimination against black workers even in the absence of labor unions urging such action. The best example is the southern textile industry, the region's most important industry during the first half of the twentieth century.[24] Anti-black animus was widespread among southern white mill workers and mill owners; as a result, black workers were almost completely excluded from the industry until after enactment of the Civil Rights Act of 1964, which forbade racial discrimination in employment.[25]

Prior to the Civil War, slaves had been widely used in the South's fledgling textile industry, but after Reconstruction, when the industry blossomed, white mill owners almost completely excluded black workers, a pattern that would continue during the southern textile boom of the early twentieth century.[26] Those blacks who secured employment in this industry did so primarily in unskilled jobs, but even these opportunities were limited. Throughout the period from 1900 to 1960,

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the coal industry was due in part to exclusion of blacks from state university educational programs).

22. To offer one example, racial violence kept virtually all black workers out of Washington County, Indiana, from about 1880 until at least World War I. EMMA LOU THORNBROUGH, THE NEGRO IN INDIANA: A STUDY OF A MINORITY 225 (1957). Several other Indiana counties used private intimidation to exclude virtually all black residents during the late nineteenth and early twentieth centuries. *Id.* at 225-28.

23. For example, in Gary, Indiana, the community's white leaders sponsored a "clean out the Negro" campaign in 1909 aimed at removing those black workers that U.S. Steel had brought to the city to build new factories. Neil Betten & Raymond A. Mohl, *The Evolution of Racism in an Industrial City, 1906-1940: A Case Study of Gary, Indiana*, 59 J. OF NEGRO HIST. 51, 53 (1974). As late as 1954, a survey of Pennsylvania employers found that ninety percent engaged in some type of racial discrimination. Louis H. Mackey, The Pennsylvania Human Relations Commission and Desegregation in the Public Schools of Pennsylvania 1961-1978, at 28 (1978) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with the College of William & Mary Law Library). In 1944, only forty-five percent of American whites believed that "Negroes should have as good a chance as white people to get any kind of job." MILDRED A. SCHWARTZ, TRENDS IN WHITE ATTITUDES TOWARDS NEGROES 74 (1967).

24. TIMOTHY J. MINCHIN, HIRING THE BLACK WORKER: THE RACIAL INTEGRATION OF THE SOUTHERN TEXTILE INDUSTRY, 1960-1980, at 8 (1999) [hereinafter MINCHIN, HIRING THE BLACK WORKER]; TIMOTHY J. MINCHIN, WHAT DO WE NEED A UNION FOR: THE TWUA IN THE SOUTH, 1945-1955, at 7 (1997) (by 1945, eighty percent of the nation's cotton spindles were located in the South).

25. One scholar has described the change in the racial employment structure of the southern textile industry in the wake of enactment of the Civil Rights Act of 1964 as being of a "magnitude . . . [that] has probably never occurred before in southern industry." Richard L. Rowan, *The Negro in the Textile Industry*, *in* NEGRO EMPLOYMENT IN SOUTHERN INDUSTRY 115 (Herbert R. Northrup ed., 1970).

26. Rowan, *supra* note 25, at 39, 47-49, 53-54.

blacks consistently comprised less than five percent of textile industry employees.[27]

No state action or labor union discrimination was required to accomplish this exclusion of black mill workers.[28] Instead, this discriminatory treatment was due in significant measure to the racial animus of mill owners and white mill workers who refused to work with blacks.[29] The large number of female workers in the textile mills contributed to white insistence on black exclusion. South Carolina did enact legislation in 1915 mandating racial segregation in that state's textile mills. That statute, however, had virtually no effect on black employment rates as blacks were already almost completely excluded from that state's textile industry.[30] Moreover, Virginia, North Carolina, and Georgia never enacted such segregation legislation, but black employment in the textile industry in those states remained minimal as well until after 1964.[31] After 1964, black employment levels in the textile industry increased in response both to Title VII of the Civil Rights Act of 1964 and Executive Order 11246, which forbade discrimination by federal contractors.[32]

In support of his view that labor regulations had a particularly pernicious effect on blacks, Bernstein asserts that "diffuse interest groups have trouble enforcing mutually desired norms in the absence of coer-

27. MINCHIN, HIRING THE BLACK WORKER, *supra* note 24, at 8; Rowan, *supra* note 25, at 54.

28. According to a 1944 study, less than ten percent of the membership of the Textile Workers Union of America, the leading textile union, was in the South, where over seventy percent of the industry (as measured by the number of cotton spindles) was located. Most southern textile mills were non-union. *See* HERBERT R. NORTHRUP, ORGANIZED LABOR AND THE NEGRO 119-20 (1944); Rowan, *supra* note 25, at 21. A major effort to unionize the southern textile industry beginning in 1929 failed. *Id.* at 58-60. The southern press attacked textile unions for being pro-black. One North Carolina newspaper wrote: " 'Do you want your sisters or daughters to marry a Negro? That is what this Communist controlled Northern Union is trying to make you do.' " STERLING D. SPERO & A.L. HARRIS, THE BLACK WORKER: THE NEGRO AND THE LABOR MOVEMENT 350 (1931) (quoting *Labor Unity*, June 22, 1929, which in turn, is quoting the *Gastonia Gazette*). Unions would remain relatively insignificant in the southern textile industry. MINCHIN, HIRING THE BLACK WORKER, *supra* note 24, at 6.

29. Rowan, *supra* note 25, at 64 ("[M]ill owners took the safe course of excluding Negroes from their operations except for outside or laboring jobs."). Many mill owners announced that they refused to use blacks other than in limited positions because of the racial hostility of white workers. MINCHIN, HIRING THE BLACK WORKER, *supra* note 24, at 17-19.

30. Rowan, *supra* note 25, at 60-61. Moreover, after enactment of the segregation law, black employment levels in South Carolina's textile industry slightly increased. Heckman & Payner, *supra* note 1, at 143 ("Initial racial exclusion [was] ratified by [the] 1915 Jim Crow law.").

31. James J. Heckman & J. Hoult Verkerke, *Responses to Epstein*, 8 YALE L. & POL'Y REV. 320, 328 (1990).

32. Richard J. Butler et al., *The Impact of the Economy and the State on the Economic Status of Blacks*, *in* MARKETS IN HISTORY: ECONOMIC STUDIES OF THE PAST 239 (David Galenson ed., 1989).

cion .... [I]t is very difficult for a cartel, including a cartel of racist whites, to operate effectively unless the government intervenes on its behalf" (p. 111). But Bernstein's claim that "a cartel of racist whites" cannot "operate effectively unless the government intervenes on its behalf" is contradicted by the experience of the southern textile industry.

Moreover, in some instances, pro-union labor regulations benefited black workers. Not all unions discriminated against black workers;[33] those African Americans who belonged to unions on a nondiscriminatory basis enjoyed the benefits of legislation designed to protect unionization.

Furthermore, some labor regulations aided black protest efforts outside of the union context. Bernstein labels the labor injunction "an anathema to unions, a blessing for African Americans" (p. 53). Accordingly, he derides the 1932 Norris La Guardia Act, which deprived federal courts of jurisdiction to issue labor injunctions, as harmful to black interests. But the Norris La Guardia Act would play a crucial role supporting black efforts to challenge racial discrimination in the workplace. During the 1930s, blacks throughout the nation launched "Don't Buy Where You Can't Work" picketing and boycott efforts aimed at businesses that refused to hire black workers.[34] The Norris La Guardia Act helped shield these protest efforts from judicial intervention. For example, in 1936, the New Negro Alliance organized a boycott of a grocery store chain in Washington, D.C., using picketing to protest the chain's refusal to hire black workers in some of its stores. The grocery store sought a federal injunction to terminate the picketing, but the United States Supreme Court interpreted the Norris La Guardia Act to deprive the lower court of jurisdiction to issue an injunction.[35] The Court's landmark decision had a profound effect on black picketing and boycott efforts. Shortly thereafter, additional protests were launched against discriminatory employers throughout the

33. *See, e.g.*, PHILIP S. FONER, ORGANIZED LABOR AND THE BLACK WORKER 1619-1973, at 195 (1974) (discussing the interracial character of the National Miners' Union); BRIAN KELLY, RACE, CLASS, AND POWER IN THE ALABAMA COALFIELDS 130 (2001) (discussing progressive nature of the United Mine Workers in the context of southern racism). By the same token, anti-union activity often harmed black as well as white workers. For example, in 1908, the United Mine Workers, with substantial black membership, conducted a strike in Alabama. Irritated in part because of the biracial character of the union, the Governor of Alabama forbade all public meetings, ordered the state militia to break up the union camp, and threatened to jail picketers. These actions crushed the strike and dealt a devastating blow to Alabama's miners, both black and white. C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877-1913, at 363 (1951).

34. AUGUST MEIER & ELLIOTT RUDWICK, ALONG THE COLOR LINE: EXPLORATIONS IN THE BLACK EXPERIENCE 314-32 (1976).

35. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552 (1938).

nation, including Washington, D.C., New York, Chicago, Philadelphia, Cleveland, and St. Louis.[36]

In sum, Bernstein correctly observes that some facially neutral labor regulation during the Reconstruction to New Deal era did have an adverse impact on black workers that was more significant than some historians have previously recognized. But disentangling the effect of this labor regulation on black workers from the array of nonregulatory factors that impeded black employment efforts such as employer racial animus and limited educational opportunities remains extraordinarily difficult.

II. CONTRACT RIGHTS, CIVIL RIGHTS, AND *LOCHNER*

Bernstein places his book in the larger debate over Lochnerian jurisprudence and its effect on certain groups within American society. He claims that "legal scholars and historians have traditionally seen Lochnerism as at best irrelevant to the welfare of African Americans, and at worst a menace" (p. 7). Bernstein contests that view. He argues that "Lochnerian jurisprudence, when applied, protected African Americans from facially neutral legislation that restricted their access to, and mobility in, the labor market" (p. 7). He further claims that the Supreme Court's rejection of *Lochner* during the 1930s harmed blacks because "Lochnerian jurisprudence, had it survived the New Deal, could have been a potent weapon against segregation" (p. 108). Bernstein's claims, however, are at odds with the historical record.

First, as noted above, many of those Lochnerian decisions that did strike down facially neutral legislation that restricted black access to, and mobility in, the labor market did not have a demonstrable effect on patterns of black employment.[37]

Second, although state laws mandating racial segregation among private parties did violate Lochnerian principles, very few courts during the *Lochner* era extended freedom of contract principles to the segregation context. Indeed, with the exception of the Supreme Court's decisions striking down local ordinances mandating residential segregation,[38] *Lochner*-era courts almost never sustained legal chal-

36. MEIER & RUDWICK, *supra* note 34, at 326.

37. For example, the impact on black migration of the two state supreme court decisions striking down emigrant agent laws is virtually impossible to discern. *See supra* note 9. Moreover, as Bernstein notes, most Lochnerian courts sustained, rather than struck down, state licensing laws that arguably harmed black workers. Pp. 30-31. As for those few decisions in which a court struck down such licensing laws, Bernstein does not argue or demonstrate that they positively affected black employment levels. Pp. 34-35.

38. The Court's most significant decision in this area was *Buchanan v. Warley*, 245 U.S. 60 (1917); *see also* City of Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler, 273 U.S. 668 (1927) (per curiam).

lenges to segregation laws.[39] Thus, to suggest that Lochnerian jurisprudence, had it survived, might have eventually been used to challenge segregation laws is nothing more than speculation.[40]

Finally, not only did *Lochner*-era courts leave state segregation laws largely untouched, they also issued decisions animated by freedom of contract concerns in two other areas that affirmatively undermined black interests. First, in response to one of the most important legislative efforts to curb racial discrimination during the Reconstruction to New Deal era — the enactment of state legislation prohibiting the segregation and exclusion of blacks in public accommodations — courts, frequently motivated by proto-Lochnerian concerns, interpreted these statutes very narrowly and in a manner preservative of the rights of business operators to continue to exclude or segregate black patrons. Second, Lochnerian courts made a substantial contribution to the explosion of northern residential segregation during the first half of the twentieth century through their enforcement of racially

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39. During the late nineteenth and early twentieth century, many states enacted legislation mandating legislation in a broad range of private engagements: on railroad cars, buses, and ferries; in hospitals and private colleges; in athletic contests; in bathing facilities at mines; and in marriage. MILTON R. KONVITZ, THE CONSTITUTION AND CIVIL RIGHTS 133-36 (1946). Yet no *Lochner*-era court struck down such a law as violative of freedom of contract. Even the United States Supreme Court refused to strike down laws mandating segregation in private contracts, upholding, for example, a state law that forbade racial integration in *private* colleges. Berea College v. Kentucky, 211 U.S. 45 (1908). For a discussion of various court decisions considering the legitimacy of state segregation laws, see CHARLES S. MANGUM, THE LEGAL STATUS OF THE NEGRO 181-222 (1940).

40. Moreover, just one year after the *Lochner* decision, the Supreme Court narrowly construed Congress's authority under the Thirteenth and Fourteenth amendments to protect the "right to contract" of black workers, leaving such workers vulnerable to private violence that deprived them of employment.

Pursuant to its power under the Thirteenth and Fourteenth Amendments, Congress in 1870 had imposed criminal liability "if two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Hodges v. United States, 203 U.S. 1, 21 (1906) (Harlan, J., dissenting). Four years earlier, in 1866, Congress had enacted legislation guaranteeing black people "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." *Id.* at 22 (Harlan, J., dissenting).

In the early twentieth century, a group of white men in Arkansas used extreme force and intimidation to induce a group of black workers to breach their employment contracts with a local sawmill. The whites were tried and convicted of violating the above-mentioned criminal statute; the indictment specifically charged the defendants with using force and threats to interfere with the black workers' right to contract. In *Hodges v. United States*, however, the Court offered a narrow construction of Congress's authority to protect the "right to contract" under the Thirteenth amendment. *Id.* at 16-19. In response to the argument that "one of the disabilities of slavery, one of the *indicia* of its existence, was a lack of power to make or perform contracts," and that the defendants, "by intimidation and force, compelled the colored men named in the indictment to desist from performing their contract," *id.* at 17, the Court nevertheless concluded that "no mere personal assault or trespass or appropriation operates to reduce the individual to a condition of slavery," *id.* at 18, and that only conduct which actually enslaves someone can be subjected to punishment under legislation enacted to enforce the Thirteenth amendment. The decision left black workers vulnerable to intimidation and violence at the hands of whites. The Court later reversed this decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

restrictive covenants and rejection of arguments that such covenants violated either the Fourteenth Amendment or public policy. Each of these two areas of *Lochner*-era decisionmaking deserves closer consideration.

A. *Enforcement of State Antidiscrimination Law*

In 1875, Congress enacted civil rights legislation that, among other things, banned racial discrimination in public accommodations.[41] In 1883, however, the United States Supreme Court held the 1875 statute unconstitutional, arguing that Congress lacked power under both the Thirteenth and Fourteenth amendments to enact legislation abrogating freedom of contract.[42] The *Civil Rights Cases* likely had an adverse impact on black access to public accommodations, even though the 1875 statute had been disregarded in parts of the nation.[43]

In response to the Court's decision in the *Civil Rights Cases*, blacks organized throughout the North to seek state legislation banning racial discrimination in public accommodations.[44] In many northern states, elections during the 1880s were closely contested between Democrats and Republicans, affording black voters, though small in number, significant political influence. In part due to the desire to secure support of black voters, state legislatures throughout the North and West enacted legislation during the 1880s banning racial discrimination in public accommodations.[45] But many northern courts, influenced by a

41. Bernstein suggests that Radical Republicans favored civil rights protection through freedom of contract and freedom of association. P. 109. In this instance, however, Radical Republicans favored *abridging* freedom of contract and freedom of association in order to prevent racial discrimination by private proprietors of public accommodations and amusements.

42. The Civil Rights Cases, 109 U.S. 3 (1883). Justice Harlan dissented, urging that Congress had the right to abrogate freedom of contract rights: "[D]iscrimination practiced by corporations and individuals in the exercise of their public or *quasi*-public functions is a badge of servitude, the imposition of which Congress may prevent under its power, by appropriate legislation, to enforce the thirteenth amendment." *Id.* at 43. The Court's rejection of Harlan's views on the legality of this abrogation of freedom of contract helped facilitate the expansion of discrimination in public accommodations.

43. Contemporary newspaper accounts suggest that the statute had a positive impact on reducing discrimination. The *Boston Daily Advertiser* claimed in 1883 that the statute "had been in force long enough to accomplish its object substantially." Leslie H. Fishel, Jr., The North and the Negro, 1865-1900: A Study in Race Discrimination 372 (1953) (unpublished Ph.D. dissertation, Harvard University) (on file with the College of William & Mary Law Library) (quoting BOSTON DAILY ADVERTISER, Oct. 16, 1883). The *Cleveland Gazette*, a black newspaper that strongly supported the civil rights legislation, predicted that the Court's decision in the *Civil Rights Cases* "will close *hundreds* of hotels, places of amusement and other public places here in the North to our people." *Id.* (quoting CLEVELAND GAZETTE, Oct. 20, 1883).

44. Fishel, *supra* note 43, at 378.

45. Connecticut (1884), Iowa (1884), New Jersey (1884), Ohio (1884), Colorado (1885), Illinois (1885), Indiana (1885), Michigan (1885), Minnesota (1885), Nebraska (1885), Rhode Island (1885), and Pennsylvania (1887) enacted antidiscrimination legislation during the

nascent "Lochnerism," offered minimal enforcement, construing these statutes very narrowly and undermining their efficacy.

Some courts refused to extend coverage to any entity not specifically listed in the statute, citing liberty of contract concerns, even though virtually every statute, in addition to prohibiting discrimination by certain enumerated businesses, also barred discrimination by any "other place of public accommodation."[46] Illinois, for example, prohibited discrimination by a variety of entities, including "restaurants," "eating houses," and "all other places of public accommodation."[47] But when a black man brought suit, alleging that a drug store soda fountain had denied him service because of his race, the Illinois Supreme Court held in 1896 that because the state legislature had not *specifically* included a drug store soda fountain in its list of covered establishments, the proprietor of the drug store was free to deny service to the plaintiff. The court articulated a robust defense of freedom of contract:

> The personal liberty of an individual in his business transactions and his freedom from restrictions is a question of the utmost moment, and no construction can be adopted by which an individual right of action will be included as controlled within a legislative enactment, unless clearly expressed in such enactment.[48]

1880s. MILTON R. KONVITZ & THEODORE LESKES, A CENTURY OF CIVIL RIGHTS 157 (1961). The Washington Territory (1890), California (1893), and Wisconsin (1895) followed suit during the 1890s. FRANK JOHNSON, THE DEVELOPMENT OF STATE LEGISLATION CONCERNING THE FREE NEGRO 74-75, 202, 207 (1919); QUINTARD TAYLOR, THE FORGING OF A BLACK COMMUNITY: SEATTLE'S CENTRAL DISTRICT FROM 1870 THROUGH THE CIVIL RIGHTS ERA 21 (1994). Of northern states east of the Mississippi, only Maine, New Hampshire, and Vermont, each with a very small black population, did not enact such legislation. Fishel, *supra* note 43, at 433 n.268. Prior to the Court's decision in the *Civil Rights Cases*, only Massachusetts (1865), New York (1874), and Kansas (1874) had enacted such legislation. KONVITZ & LESKES, *supra*, at 155-56.

46. *See, e.g.*, Faulkner v. Solazzi, 65 A. 947 (Conn. 1907) (barbershop); Cecil v. Green, 43 N.E. 1105 (Ill. 1895) (soda fountain); Brown v. J.H. Bell Co., 123 N.W. 231 (Iowa 1909) (merchant's booth at a food show); Humburd v. Crawford, 105 N.W. 330 (Iowa 1905) (boarding house); Rhone v. Loomis, 77 N.W. 31 (Minn. 1898) (saloon); Burks v. Basso, 73 N.E. 58 (N.Y. 1905) (boot black stand); Hargo Kellar v. Koerber, 55 N.E. 1002 (Ohio 1899) (saloon).

Some courts did allow suits to go forward despite the fact that the specific entity was not named in the statute. *See, e.g.*, People v. King, 42 Hun. 186 (N.Y. Sup. 1886) (skating rink); Kopper v. Willis, 9 Daly 460 (N.Y. Com. Pl. 1881) (restaurant); Youngstown Park & Falls St. Ry., 4 Ohio App. 276 (1915) (dancing hall); Valeria W. Weaver, *The Failure of Civil Rights 1875-1883 and its Repercussions*, 54 J. OF NEGRO HIST. 368, 379 (1969).

47. JOHNSON, *supra* note 45, at 97.

48. Cecil v. Green, 43 N.E. 1105, 1106 (Ill. 1896); *see also* Goff v. Savage, 210 P. 374, 375 (Wash. 1922) (holding that a drug store soda fountain is not a place of public accommodation and that "[i]t is the right of a trader whose business is purely of a private character to trade with whom he will, and . . . [to] discriminate as he pleases").

The Illinois state legislature rejected the court's narrow interpretation, quickly amending its antidiscrimination law to explicitly cover soda fountains.[49]

Similarly, the Minnesota Supreme Court held in 1898 that a saloon was not a "place of public refreshment" within the meaning of that state's antidiscrimination law and that therefore the proprietor of a saloon was free to deny service to a black man.[50] The court conceded "that the word 'refreshment' may include intoxicating liquors, and that the words 'places of refreshment' may . . . include a place where liquors are sold as a beverage," but nevertheless held that the statute did not apply to saloons because the legislature had failed to use the word "saloon" — though it had used the word "tavern" — in its list of covered entities.[51] Within months, the Minnesota state legislature amended its law to specifically include "saloons" in its antidiscrimination statute in response to the court's narrow construction.[52]

In 1910, the Iowa Supreme Court held, over two dissents, that a vendor at a food show (to which the public was invited and admission was charged) who served free coffee was not covered by that state's antidiscrimination law, notwithstanding statutory language including "all other places where refreshments are served."[53] In defending its construction of the statute, the Court noted that " 'the law does not undertake to govern or regulate the citizen in the conduct of his private business' "[54] and that "[i]t rested solely with the defendants to say who they would serve, and the courts should not undertake to control such matters."[55] Again, solicitude for the contract rights of private parties trumped the desire of the legislature to prohibit racial discrimination in public accommodations.

Some courts interpreted "public accommodation" as comprising only those businesses thought to be "affected with the public interest" such as common carriers and inns.[56] For example, in 1907, the Connecticut Supreme Court construed that state's antidiscrimination law, which it described as being "in derogation of a common private right" and "restrictive of personal liberty,"[57] as not encompassing a barber shop as a place of public accommodation:

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49. SPEAR, *supra* note 14, at 41.

50. Rhone v. Loomis, 77 N.W. 31 (Minn. 1898).

51. *Id.* at 33.

52. GILBERT STEPHENSON, RACE DISTINCTIONS IN AMERICAN LAW 132 (1910).

53. Brown v. J.H. Bell Co., 123 N.W. 231, 233 (Iowa 1910).

54. *Id.* at 234 (quoting Bowlin v. Lyon, 25 N.W. 766 (Iowa 1884)).

55. *Id.* at 236.

56. Faulkner v. Solazzi, 65 A. 947, 947 (Conn. 1907).

57. *Id.* at 949.

> there are certain occupations which the law has long clothed with a public character which not only invests the public with the power of regulation, but also, in the absence of regulation, involves duties to the individual members of the public of the most stringent character and highest consequence. Such occupations are those of the common carrier and innkeeper.[58]

The court concluded that "the common law has never recognized barber-shops as possessing that peculiar quality, as places of public accommodation, which is attached to hotels and common carriers;" hence, barber shops were free to discriminate against black patrons.[59] Yet the court ignored the fact that the Connecticut statute had modified the common law by expanding the concept of public accommodations beyond hotels and common carriers.[60]

Throughout the North, the reluctance of courts to vigorously enforce antidiscrimination legislation[61] contributed to the continuation of racial discrimination in public accommodations.[62] The *New York Age* commented in 1890 on the unwillingness of courts to enforce the legislation:

> People of Afro-American extraction who live here [in New York City] or who pass through this city, need not be told that there are keepers of restaurants, saloons, theatres, etc., who almost daily kick Afro-Americans out of their places, when the latter happen to go there for accommodation; and that these same persons, knowing the inadequacy of the law for any redress, laugh in your faces and tell you to sue and do your best.[63]

Racial discrimination in public accommodations would sharply increase in much of the North during the 1910s and 1920s in response to the dramatic increase in southern black migration into many northern cities,[64] but northern courts, influenced in part by Lochnerism, would

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58. *Id.* at 948.

59. *Id.*

60. Though Connecticut had not specifically listed barber shops in its statute, it did specify "other places of public accommodation." *Id.*

61. Some courts denied liability on the basis of a technicality. An Ohio circuit court, for example, reversed a verdict for a black plaintiff who had been refused a ticket in the parquet section of a Cincinnati theater, concluding that the plaintiff had not proven that the theater had authorized the ticket seller to refuse him a ticket. In so doing, the court sidestepped established principles of agency law. FRANK U. QUILLIN, THE COLOR LINE IN OHIO: A HISTORY OF RACE PREJUDICE IN A TYPICAL NORTHERN STATE 118-19 (1913).

Nebraska's antidiscrimination statute expressly extended protection to "all persons," but because the statute was titled "an act to provide that all citizens shall be entitled to the same civil rights," the Nebraska Supreme Court held that a black plaintiff's failure to allege in his complaint that he was a citizen was fatal to his claim of racial discrimination by the proprietor of a barber shop. Messenger v. State, 41 N.W. 638, 638-39 (Neb. 1889).

62. Weaver, *supra* note 46, at 377-78.

63. Fishel, *supra* note 43, at 386 (quoting NEW YORK AGE, Apr. 12, 1890).

64. *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 891 (1998).

continue to undermine enforcement of state antidiscrimination laws through narrow constructions of statutory language.[65]

B. *Judicial Enforcement of Racially Restrictive Covenants*

Bernstein argues that African Americans seeking housing in cities that had ordinances mandating residential segregation "benefited from Lochnerian jurisprudence" (p. 115). To be sure, in 1917, the United States Supreme Court in *Buchanan v. Warley*[66] did strike down a local Louisville ordinance that mandated racial segregation in housing because it constituted an undue restraint on the alienation of property. The *Buchanan* decision, however, had a limited impact on patterns of racial segregation. In the wake of *Buchanan*, private discrimination in the residential housing market sharply increased due in significant measure to the widespread use of racially restrictive covenants pursuant to which property owners agreed not to sell or lease real property to blacks or other racial minorities.[67] *Lochner*-era courts consistently enforced these covenants, contributing to the dramatic increase in residential segregation during the first half of the twentieth century.

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65. *See, e.g.*, Chochos v. Burden, 128 N.E. 696 (Ind. 1921) (finding that ice cream parlor is not an "eating-house"); Goff v. Savage, 210 P. 374 (Wash. 1922) (finding that a drug store soda fountain is not a place of public accommodation). Northern state legislatures would continue to modify their antidiscrimination statutes in order to respond to the narrow interpretations rendered by courts. KONVITZ, *supra* note 39, at 123.

66. 245 U.S. 60 (1917).

67. MASSEY & DENTON, *supra* note 12, at 24, 30-31. Massey and Denton note a number of factors contributing to the sharp increase in residential segregation during the late 1910s and the early 1920s, including racial violence, but emphasize the role of racially restrictive covenants: "After 1910, the use of restrictive covenants spread widely throughout the United States, and they were employed frequently and with considerable effectiveness to maintain the color line until 1948, when the U.S. Supreme Court declared them unenforceable." *Id.* at 36; *see also* GUNNAR MYRDAL, AN AMERICAN DILEMMA 622-27 (1944) (discussing importance of racially restrictive covenants as means of ensuring residential segregation after *Buchanan* decision). The *Buchanan* decision, which appeared to foreclose the use of local ordinances mandating residential segregation, contributed to the expanded use of these restrictive covenants to accomplish the same goal. *See* CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 52 (1959). By the 1940s, eighty-five percent of Detroit's real estate was encumbered by a racially restrictive covenant, as were 559 block areas in St. Louis, and more than eleven square miles of Chicago real estate. *Id.* at 9; ROBERT WEAVER, THE NEGRO GHETTO 116 (1948).

Moreover, the *Buchanan* decision did not end the use of residential ordinances mandating residential segregation. Such ordinances continued to be deployed in cities such as Richmond, New Orleans, Winston-Salem (North Carolina), Oklahoma City, and Dallas; in each of those cities subsequent litigation was required to enforce *Buchanan*. *See* City of Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler, 273 U.S. 668 (1927) (per curiam); Clinard v. Winston-Salem, 6 S.E.2d 867 (N.C. 1940); Allen v. Oklahoma City, 52 P.2d 1054 (Okla. 1936); Liberty Annex Corp. v. Dallas, 289 S.W. 1067 (Tex. Civ. App. 1927).

One state, Minnesota, did abrogate by statute the rights of property owners to agree to a restrictive covenant "directed toward any person of a specified faith or creed." PAULI MURRAY, STATES' LAWS ON RACE AND COLOR 236 (1951).

In what appears to be the first reported decision assessing the constitutionality of an effort to secure judicial enforcement of a racially restrictive covenant, in 1892 a federal court in California denied enforcement on the grounds that to do otherwise would violate the Fourteenth amendment and would be contrary to public policy.[68] Courts of the *Lochner* era, however, rejected that view until the United States Supreme Court's 1948 landmark decisions in *Shelley v. Kraemer*,[69] which once again held that judicial enforcement of racially restrictive covenants violated the Fourteenth Amendment, and *Hurd v. Hodge*,[70] which held that judicial enforcement of such covenants in the District of Columbia was contrary to public policy and violative of the Civil Rights Act of 1866.

Beginning in 1915 and continuing until the 1948 *Shelley* and *Hurd* decisions, state and federal courts, implicitly drawing on Lochnerian principles of freedom of contract, enforced racially restrictive covenants, rejecting arguments that judicial enforcement of these private contracts either constituted state action for purposes of a Fourteenth amendment violation or was contrary to public policy.[71] Moreover, in granting judicial enforcement of racially restrictive covenants, these courts declined to follow the principle enunciated in several *Lochner*-era railroad cases that courts should not enforce a covenant restricting a property owner's use of land if the covenant was contrary to public policy.[72]

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68. Gandolfo v. Hartman, 49 F. 181 (S.D. Cal. 1892). The court also found that judicial enforcement of the covenant barring conveyance of real estate to "a Chinaman" was in violation of a U.S. treaty with China. *Id.* at 182.

69. 334 U.S. 1 (1948).

70. 334 U.S. 24 (1948).

71. The first court to uphold a racially restrictive covenant barring the sale of real estate to a black person was a 1915 decision by the Supreme Court of Louisiana. Queensborough Land Co. v. Cazeaux, 67 So. 641 (La. 1915). Other courts followed. The U.S. Supreme Court's decision in *Corrigan v. Buckley*, 271 U.S. 323 (1926), upheld a racially restrictive covenant but without reaching the issue of whether judicial enforcement of the covenant was constitutional, proved to be important as many other courts erroneously concluded that the Court had resolved the constitutionality of judicial enforcement of restrictive covenants. Brief for the United States as Amicus Curiae at 43, Shelley v. Kraemer, 334 U.S. 1 (1948) (No. 72).

A few courts enforced racially restrictive covenants only to the extent that they barred the *use* of property by a black person, holding contractual restraints on the *sale* of real estate to a black person to be an unenforceable restraint on alienation. Los Angeles Invest. Co. v. Gary, 186 P. 596 (Cal. 1919); Porter v. Barrett, 206 N.W. 532 (Mich. 1925). Most courts, however, enforced racially restrictive covenants regardless of whether the covenant barred sale to blacks or occupancy by blacks. VOSE, *supra* note 67, at 21; D.O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 33 CAL. L. REV. 5, 8-11 (1945) (listing and discussing court decisions upholding restrictive covenants); *see also* Brief for the United States as Amicus Curiae at 41-45, *Shelley*, 334 U.S. 1 (same).

72. *See, e.g.*, Beasley v. Texas & Pac. Ry. Co., 191 U.S. 492 (1903) (refusing to enforce a deed covenant restricting the building of a railroad depot on grounds that the covenant provision was contrary to public policy); Seaboard Airline Ry. Co. v. Atlanta, B & C R.R. Co.,

These court decisions did not specifically articulate freedom of contract concerns indicative of Lochnerian jurisprudence. Nevertheless, by construing narrowly state action under the Fourteenth amendment and declining to find racial exclusion to be a violation of public policy, these courts implicitly embraced a broad vision of contractual freedom — a vision considerably broader than that articulated by the pre-*Lochner* federal district court in California in 1892 and the post-*Lochner* United States Supreme Court in 1948. The willingness of *Lochner*-era courts to enforce racially restrictive covenants contributed to the sharp increase in residential segregation that began in earnest during World War I.[73]

Bernstein argues that Lochnerian jurisprudence "lasted far too short a time to provide much protection to African American workers" (p. 7), but in fact the demise of *Lochner* coincided with the beginnings of government regulation *prohibiting* racial discrimination by employers and labor unions. During the 1930s, a few northern states prohibited racial discrimination in public employment;[74] several other northern states extended this statutory ban to private employers and labor unions during the 1940s.[75] Moreover, in 1941, President Franklin Roosevelt issued an executive order establishing a Fair Employment Practice Committee ("FEPC") banning racial discrimination by private employers and labor unions engaged in federal contract work.[76]

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35 F.2d 609 (5th Cir. 1929) (refusing to enforce railroad's promise to provide an interlocking switch at a rail crossing as contrary to the public interest); Florida Cent. & P.R. v. State *ex rel.* Mayor, 13 So. 103 (Fla. 1893) (refusing to enforce promise of railroad to build depot in a certain location on grounds that contract is void as against public policy).

73. MASSEY & DENTON, *supra* note 12, at 24. To be sure, government action also contributed to the increase in residential segregation during the 1930s and 1940s. During the Depression, the federal government established several housing programs designed to encourage homeownership. For example, the Federal Housing Administration ("FHA") insured private mortgages on residential property that met the agency's standards. The FHA's mortgage standards, however, promoted residential segregation, as the agency generally would only insure homes in racially homogeneous neighborhoods or homes that were covered by racially restrictive covenants. This practice had an important impact on residential segregation patterns. DAVISON M. DOUGLAS, READING, WRITING, AND RACE: THE DESEGREGATION OF THE CHARLOTTE SCHOOLS 53-54 (1995). Despite this government action, racially restrictive covenants probably had a more significant impact on residential segregation.

74. MANGUM, *supra* note 39, at 174 (discussing state statutes in Illinois, New York, Ohio, and Pennsylvania banning racial discrimination in public employment); MURRAY, *supra* note 67, at 57 (discussing a similar statute in California).

75. By 1950, at least twelve states had enacted bans on racial discrimination by either private employers or labor unions. MURRAY, *supra* note 67, at 64, 147, 220, 261, 267, 270, 291, 312, 380, 396, 494, 514 (Connecticut, Indiana, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Washington, and Wisconsin). Labor unions played an important role in securing passage of many of these statutes. RAY MARSHALL, THE NEGRO AND ORGANIZED LABOR 276 (1965).

76. MURRAY, *supra* note 67, at 565-68.

Although Bernstein is quite dismissive of the efficacy of the FEPC,[77] recent scholarship suggests that the FEPC had a significant impact on black employment in the defense industry in nonsouthern states.[78] Had courts retained Lochnerian principles into the 1940s, as Bernstein urges, these antidiscrimination efforts would have likely been declared unconstitutional (as would later congressional efforts to ban racial discrimination with the Civil Rights Act of 1964). Hence, the demise of *Lochner*, contrary to Bernstein's assertion, was well-timed to serve black interests. For example, in a decidedly post-Lochnerian decision, the United States Supreme Court in 1945 upheld a New York statute prohibiting racial discrimination by labor unions, rejecting the union's argument that the statute violated its "liberty of contract" rights.[79]

CONCLUSION

David Bernstein has provided us with an important narrative of the impact of government economic regulation on African Americans. The period between Reconstruction and the New Deal was an era of profound anti-black sentiment in America that manifested itself in a variety of public and private actions that undermined the political, economic, and social status of African Americans. At a time when blacks generally enjoyed minimal political influence, whites used the regulatory powers of the state to improve their own situation. This should come as no surprise. As Bernstein notes, "regulatory legislation tends to benefit those with political power, at the expense of those without such power" (p. ix). Minority groups who lack political power are likely to be harmed not just by private actors, but also by government actors when dominant interest groups use the coercive power of the state to solidify their position.

Lochnerian jurisprudence bore the potential to offset aspects of this political advantage, but this potential went largely unrealized. *Lochner*-era courts not only declined to apply liberty of contract principles to strike down laws mandating segregation among private actors, but many also affirmatively undermined black interests by narrowly construing state antidiscrimination laws so as to preserve the rights of business owners to discriminate and by enforcing private racially restrictive covenants despite claims that such enforcement violated the Fourteenth amendment or was contrary to public policy.

77. "At its worst, the FEPC was completely ineffective. At its best, it froze an unfavorable status quo." P. 82.

78. William Collins, *Race, Roosevelt, and Wartime Production: Fair Employment in World War II Labor Markets*, 91 AM. ECON. REV. 272, 272 (2001) ("[The] Roosevelt administration's effort to enforce a nondiscrimination policy in war-related employment played a significant role in opening doors for black workers.").

79. Ry. Mail Assoc. v. Corsi, 326 U.S. 88, 93 (1945).

Beginning in the 1940s, African Americans began to enjoy greater political influence and were able to secure governmental action in some states banning racial discrimination in private employment contracts, efforts that would achieve success at the national level in the 1960s. Though Bernstein sees the demise of Lochnerism during the late 1930s as harmful to the interests of black workers, in fact, the death of *Lochner* allowed these prohibitions on racial discrimination in the workplace to proceed unfettered by liberty of contract ideology.

THOSE WHO REMEMBER THE PAST MAY NOT BE CONDEMNED TO REPEAT IT*

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STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS. By *Gary Jonathan Bass*. Princeton: Princeton University Press. 2000. Pp. 402. $29.95.

THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST. By *Lawrence Douglas*. New Haven: Yale University Press. 2001. Pp. xiii, 318. $35.

FOR HUMANITY: REFLECTIONS OF A WAR CRIMES INVESTIGATOR. By *Richard J. Goldstone*. New Haven: Yale University Press. 2000. Pp. xxiii, 152. $18.50.

CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE. By *Geoffrey Robertson*. New York: The New Press. 2000. Pp. xxxiv, 554. $30.

INTRODUCTION

In The Hague, Slobodan Milosevic is on trial for crimes committed in Bosnia, Kosovo and Croatia;[1] in Arusha, Tanzania, Jean Paul Akayasu, a Rwandan bourgmestre, was convicted of genocide;[2] in London, Augusto Pinochet was detained and adjudged amenable to an arrest warrant issued by a Spanish magistrate for acts of torture

* This title refers to the famous observation of George Santayana, "Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, 1 THE LIFE OF REASON (1905-06) *quoted in* JOHN BARTLETT, FAMILIAR QUOTATIONS 703 (15th ed. 1980).

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1. *See* Suzanne Daley, *Milosevic Faces Single Trial Asked by Hague Prosecution*, N.Y. TIMES, Feb. 2, 2002, at A4.

2. *See* Judgment, Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998, International Criminal Tribunal for Rwanda), *available at* http://222.un.org/ictr/english/judgments/akayesu.html (a Rwandan bourgmestre is the elected leader of a commune something akin to the mayor of a city).

carried out in Chile;[3] in Belgium, a Hutu Roman Catholic former mother superior was convicted of complicity in the Rwandan genocide;[4] and in Rome a treaty was signed commencing the process that will result in the creation of the International Criminal Court ("ICC").[5] All these events underscore the startling growth of efforts to establish a worldwide criminal process capable of punishing heinous crimes ranging from genocide to grave breaches of the Geneva Conventions. Though the pace of change has been dramatic over the past few years, the forces driving it have been building up for at least half a century.

Each of the four books under review is, in one way or another, designed to address the process of transition from a regime of strict national sovereignty and local prosecution of criminal acts to an international one in which major abuses can and will be punished in courts around the world. Two of these volumes, Gary Bass's, *Stay the Hand of Vengeance*, and Lawrence Douglas's, *The Memory of Judgment*, provide excellent scholarly analyses of various historical aspects of the growth of international criminal prosecution. A third, Justice Richard Goldstone's, *For Humanity*, provides the recollections of one of the architects of transformation about his work as chief prosecutor for the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[6] and the International Criminal Tribunal for Rwanda ("ICTR").[7] The fourth book, Geoffrey Robertson's, *Crimes Against Humanity*, is far weaker than the others, and presents an idiosyncratic and polemical assessment of some of the matters addressed in the other volumes. Part I of this Review examines some of the critical events that have contributed to the current upsurge in international criminal prosecutions. Then each of the four books is discussed. The Review concludes with two suggestions, one a potentially useful means of explaining why change has taken place, the other an exploration of the role of truth commissions in the prosecutorial effort.

I. THE PAST AS PROLOGUE — TRACING THE UPSURGE IN INTERNATIONAL CRIMINAL PROSECUTIONS

While precedent-establishing international prosecution of grave misconduct had to await the conclusion of the Second World War,

3. *See* ROBERTSON, pp. 388-98.

4. *See* Marlise Simons, *Mother Superior Guilty in Rwandan Killings*, N.Y. TIMES, June 9, 2001, at A4.

5. *See* GOLDSTONE, pp. 120-38.

6. *See* S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/Res/827 (1993) (approving the Yugoslavia Tribunal).

7. *See* S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 2, U.N. Doc. S/Res/955 (1994) (approving the Rwanda Tribunal).

there were rumblings in Europe about the need for some international mechanism to punish the serious misdeeds of military leaders and their minions a good deal earlier. In 1815, there were discussions about prosecuting Napoleon in response to his efforts to subjugate all of Europe by force of arms.[8] Eventually, the British concluded that such a trial was not worthwhile, although several of Bonaparte's most famous subordinates, Michel Ney and Charles de la Bèdoyére, were tried and convicted in French courts.[9]

The idea of using legal prosecution to punish grave misconduct during armed conflicts was revived during the First World War in response to two very different problems. The first of these was the Turkish program carried out during 1915 to murder the Armenian minority within its borders.[10] The second was the allegedly unlawful tactics adopted by Kaiser Wilhelm II and his generals in their efforts to secure a German victory over the Allied forces arrayed against them.[11] The British were the chief proponents of criminal prosecutions in both cases.

A. *Armenians and Turks*

After the Allied victory over the Ottoman Empire in 1918, Britain pressed the newly installed Turkish government to prosecute, while His Majesty's Government moved to incarcerate those Turkish leaders deemed responsible for the slaughter of as many as 1,000,000 Armenians in 1915. This British effort was fueled by strong domestic antipathy toward the Muslim Turks for their unspeakable barbarity toward the Armenian Christians. A large number of Turkish leaders were seized, but the criminal process bogged down both because of proof problems and concerns over the fairness of the proceedings. As time dragged on, prosecutorial momentum was lost. Eventually, the British dramatically reduced the size of their occupation force in the Ottoman Empire. This had the effect of reducing British authority and leverage with respect to prosecutions. A group of ardent Turkish Nationalists (the "Young Turks"), led by Mustafa Kemal Atatürk, seized on the issue of prosecutions as one of several grievances warranting rebellion against the post-war Turkish regime. During the ensuing civil war, the Nationalists took British hostages. Rather than risk the hostages' lives or commit British troops to combat with the Nationalists, the British government decided to abandon its insistence upon prose-

8. *See* BASS, pp. 37-57.

9. *See id.* at 39.

10. My discussion of Turkey's genocidal attack on the Armenians and its legal aftermath is based on BASS, pp. 106-46.

11. My discussion of the Allied efforts to prosecute Wilhelm II and alleged German war criminals is based on BASS, pp. 58-105.

cution. The delay in mounting trials, along with Turkish backlash against British intervention and a lack of complete British military dominance, all worked to undermine legal action against what may have been the first twentieth century genocide.

B. *Pursuing the Kaiser*

The immense blood letting on the Western Front, the wide-ranging use of submarine warfare, the Zeppelin attacks from the air on civilian targets, the use of poison gas, and disregard for the neutral status of a number of nations all fed an Allied clamoring for the prosecution of the leaders of the German war effort, most particularly the German head of state, Kaiser Wilhelm II. The Kaiser, however, fled Germany at the end of the war and took refuge in the Netherlands, which granted him asylum. The British and French were outraged and demanded that Wilhelm be turned over to an international tribunal for prosecution. These demands were resisted not only by Germany and the Netherlands, but also by the United States, which proposed an international commission of inquiry rather than a trial. In the end, the Kaiser was not prosecuted. Instead, Germany agreed to a small number of war crimes trials to be held before the German Supreme Court in Leipzig. These cases were a fiasco — either the accused were acquitted or given incredibly lenient sentences. Since the Allies had not occupied Germany at the end of the war, they had no recourse short of invasion. This choice proved unpalatable, and there the question of prosecution ended, but not before the experience soured a generation of British officials (including Winston Churchill) on international prosecutions and embittered Germans not only against the Allies, but against the newly established Weimar Republic as well.

C. *Nuremberg*

Thus, it was in a historical context of failure and frustration that debate about prosecution arose during World War II. As the tide of battle turned against the Nazis, discussions began about post-war punishment of war criminals. In 1943, representatives of Great Britain, the Union of Soviet Socialist Republics ("USSR"), and the United States met in Moscow and declared:

> [T]hose German officers and men and members of the Nazi party . . . who have been responsible for . . . atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries. The above declaration is without prejudice to the case of the major war criminals whose offenses have no par-

> ticular geographical localization and who will be punished by the joint decision of the governments of the allies.[12]

While this declaration did not settle precisely how war criminals would be dealt with, it did contemplate prosecution at the scene of the crime for lesser criminals as well as some as yet unspecified process for the newly minted category of "major war criminals."

By mid-1944, the end of the war was in sight and the debate about the handling of war criminals intensified. In light of their World War I experience the British, particularly Churchill, pressed for summary execution of major war criminals. Although some factions of the American government were sympathetic to this idea, others (centered around the Secretary of War, Henry Stimson) vigorously opposed any solution that did not " 'embody . . . at least the rudimentary aspects of the [American] Bill of Rights, namely notification of the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses in his own defense.' "[13] Surprisingly, even Stalin opposed the British on summary executions, declaring " '[t]here must be no execution without trial otherwise the world would say we were afraid to try them.' "[14] What Stalin may have had in mind, however, was not American-style trials but "show" trials of the sort he stage-managed in Moscow during the 1930s[15] and the Soviets used in Kharkov in December 1943 to convict three Germans and a Soviet accused of atrocities.[16]

After long and difficult negotiations, the American approach was adopted and the Allies agreed, in the so-called London Agreement and Charter, to create an International Military Tribunal ("IMT") to try leading Nazi war criminals.[17] Although the tribunal bore the name "Military," it was not designed or intended as a court martial but rather as a proceeding with the fundamental attributes of civilian criminal justice.[18] The first (and only) trial to be conducted by the IMT took place in Nuremberg, Germany, beginning on November 20, 1945. This trial had two principal purposes. The first was the traditional one

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12. Moscow Declaration of Nov. 1, 1943, *reproduced in* EUGENE DAVIDSON, THE TRIAL OF THE GERMANS 4-5 (1966).

13. Memorandum from Henry Stimson to John McCloy, Assistant Secretary of War (Sept. 9, 1944) *quoted in* ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 54 (1983).

14. Letter from Winston Churchill to Franklin D. Roosevelt (Oct. 22, 1944) (detailing conversation Churchill had with Stalin) *quoted in* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 31 (1992).

15. For a powerful description and analysis of the Moscow Show Trials, see ROBERT CONQUEST, THE GREAT TERROR (1973).

16. *See* WHITNEY R. HARRIS, TYRANNY ON TRIAL 6 (1999).

17. The Charter of the International Military Tribunal is reproduced as Appendix A in TAYLOR, *supra* note 14, at 645-53.

18. *See* JOSEPH E. PERSICO, NUREMBERG — INFAMY ON TRIAL 464-65 n.34 (1994).

of punishing top Nazi leaders for the crimes they had personally committed during the Third Reich. The second was something quite different. It had little to do with the defendants at all — the goal was to create an indelible record of Nazi tyranny from 1933 until Germany's defeat in 1945. As Secretary of War Stimson described this objective, the trial was to be used as a "way of making a record of the Nazi system of terrorism and the effort of the Allies to terminate the system and prevent its recurrence."[19] There were a number of motives behind this second objective. Churchill, Roosevelt, and other Western leaders had been obliged, before the start of World War II, to deal with revisionist claims about the *First* World War. In the United States, such revisionism reinforced a tendency toward isolationism and in Britain, an inclination toward appeasement. There appeared to be a feeling among key leaders that such problems should never be allowed to arise with respect to the Second World War. As Judge Samuel Rosenman, a Roosevelt confidant, said of his leader:

> He was determined that the question of Hitler's guilt — and the guilt of his gangsters — must not be left open for future debate. The whole nauseating matter should be spread out on a permanent record under oath by witnesses and with all the written documents . . . In short, there must never be any question anywhere by anyone about who was responsible for the war and for the uncivilized war crimes.[20]

Similar sentiments were echoed by members of Congress and the American Chief IMT Prosecutor, Supreme Court Justice Robert Jackson who declared:

> Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. We must establish incredible events by credible evidence.[21]

There were other reasons as well for the Allied desire that Nuremberg document the history of the Nazi Reich. Generals Eisenhower, Bradley, and Patton all witnessed firsthand the horrors of the Nazi concentration camps. They ordered their troops to visit the camps and directed that German civilians be compelled to go as well. They believed there should be as many witnesses as possible to the reality of the Nazis' crimes. The big picture of Nazi criminality was also needed to help establish a predicate to punish not only the Nazi hierarchy, but the tens of thousands of Hitler's followers who also commit-

19. H.L. STIMSON & MCGEORGE BUNDY, ON ACTIVE SERVICE IN PEACE AND WAR (1947), *quoted in* 1 DREXEL A. SPRECHER, INSIDE THE NUREMBERG TRIAL: A PROSECUTOR'S COMPREHENSIVE ACCOUNT 31 (1999).

20. SAMUEL L. ROSENMAN, WORKING WITH ROOSEVELT 518-19 (1952), *quoted in* WILLIAM J. BOSCH, JUDGMENT ON NUREMBERG 25 (1970).

21. Report from Robert Jackson to Harry S. Truman (June 7, 1945), *quoted in* TAYLOR, *supra* note 14, at 54.

ted serious crimes. A stirring and complete record might serve as a substitute for painstaking fact-finding in each case. Such a record could also serve a number of political goals, including homefront justification of the costly war effort and encouragement of Soviet/American cooperation in the tense post-war period.

Pursuing the full historical story while at the same time prosecuting individual criminals is an immensely costly, time-consuming, and difficult task. It requires the tracing of a whole regime's plans, intentions, and actions as well as those of the accused in the dock. Focusing on the words and deeds of the defendants alone will not do. In the Nazis' case, this meant that the life of Adolf Hitler became a central part of the trial, as did the activities of the Gestapo, Foreign Ministry, Wehrmacht and a host of other government entities.

The conditions at Nuremberg were uniquely well suited to the preparation and presentation of an enormous didactic case.[22] Almost every top Nazi official still living was available for interrogation and prosecution. Both because of the Nazis' own predilections and the completeness of the Allied victory, the triumphant governments were in possession of an unprecedented collection of meticulous records presenting, in the Nazis' own words, the nature and scope of their crimes. This treasure trove was augmented by a host of films and photographs, making possible a graphic presentation of Nazi atrocities. Because the Germans had unconditionally surrendered, there was no government in place to resist anything the Allies chose to do at Nuremberg. Germany was under firm Allied military control, with no room left for the sort of organized resistance that arose in Germany at the time of the Leipzig trials or in Turkey when the British sought the prosecution of those who massacred the Armenians. The United States, the most powerful and wealthy country in the world, committed itself fully to the Nuremberg prosecution. America made virtually unlimited resources available for the scouring of records, preparation of films, interrogation of witnesses and presentation of a vast historical case. Both the American and British trial teams were staffed with gifted advocates, beginning with the enormously eloquent and energetic Justice Robert Jackson. Finally, there was no effective defense bar in place to resist the puissant prosecutorial teams. The German lawyers asked to represent the defendants had virtually no resources and had, themselves, just lived through twelve years of numbing Nazi tyranny.

To pursue the two goals yoked together at Nuremberg, the prosecuting governments agreed to use an essentially adversarial process that relied on the parties to generate the evidence and conduct the

22. For a description of the background to, and operation of, the Nuremberg Tribunal, see TAYLOR, *supra* note 14. The following assessment of Nuremberg is based, primarily on Taylor's outstanding work.

proceedings. This approach served the victors well, allowing the American government to use its vast resources to prepare the prosecution case while leaving the defendants more or less on their own. The defendants were forced to do double duty as individuals accused of specific crimes *and as representatives* of an evil regime deserving of condemnation. The trial shifted from a focus on personal responsibility to a recitation of enormous and organized criminality. It grew into a mammoth nine-month undertaking that generated more than forty-two volumes of evidence and a series of stunning film presentations. To make its lasting historical record, the Nuremberg prosecution focused not on witnesses but on Nazi documents, a virtually unimpeachable source. Traditional rules of evidence and procedure were abandoned so that the complex story could be told unimpeded by traditional constraints regarding relevance, hearsay, and authentication.

Nuremberg is the seminal event in post-World War II international criminal justice. It is the precedent upon which all ensuing developments are based. In large measure, this is due to the widely shared perception that Nuremberg worked. The Nazis convicted at Nuremberg clearly deserved condemnation and the didactic record the Allies produced has withstood the test of time. This has led more recent prosecutors and legislators to see Nuremberg as an appropriate model for emulation. Nuremberg's success bolstered the belief that vast narratives of governmental bestiality can be presented in sprawling trials, with the interests of individual criminal defendants properly respected. In Nuremberg's wake, it has become acceptable to assume that both didactic and individual goals can be met in the same proceeding.

What may not be clear from a cursory look at Nuremberg is that it succeeded because of the incredibly advantageous conditions in which the trial was held, and due to the outstanding fairness and care of the judges, most particularly the IMT's President, Sir Geoffrey Lawrence. Many of the safeguards that ensure the integrity of adversary proceedings were abandoned at Nuremberg. The defendants were provided inexperienced and underfunded counsel. The protections afforded by a host of evidence rules were put aside. There was no arrangement for appellate review and there was intense pressure for a speedy resolution of the case. The main targets of the prosecution were not the defendants, but rather such monsters as Hitler, Himmler and Goebbels. The men in the dock were, frequently, little more than stand-ins. It is truly remarkable that the Nuremberg trial succeeded in doing and appearing to do justice, rather than getting sidetracked by prejudice and the temptation to treat the accused as fall guys. The Tribunal displayed a nuanced appreciation of the individual defendants' positions when it acquitted three of them and sentenced a number of others relatively leniently. Despite the Soviet view that indict-

ment was tantamount to conviction and that conviction always warranted death, the Tribunal majority differentiated and showed careful judgment.

Several other aspects of the work of the IMT are worth noting. The didactic case prepared and presented, in large measure, by the American prosecutors was not primarily focused on the Holocaust. Rather, it conceived of military aggression as the Nazis' chief crime. The Americans worked to show unlawful aggression by producing thousands of German government documents — so many in fact that Lord Justice Lawrence eventually imposed limitations to ensure that the Tribunal and defense would not be overwhelmed. At that moment, the Americans, sensing a loss of momentum and credibility, turned from their documentary tale of aggression to proof of atrocity and, inadvertently, the Holocaust. This "new" evidence, most particularly a film entitled *Nazi Concentration Camps*, was riveting, restored prosecutorial momentum, and regained the moral high ground for the prosecution. The Americans would return to atrocity evidence to revive flagging fortunes several more times while the French and Soviet prosecution teams would make such matters the core issue of their cases. Nuremberg displayed to the world and prosecutors just how affecting and persuasive Holocaust evidence could be and thereby bound future trials to such materials. In presenting an enormous and horror-filled case, Nuremberg raised the stakes of international criminal prosecutions. Any failure at Nuremberg would have been perceived as a devastating blow, discrediting the Allies' view of history and their claims of Nazi barbarity. The two-track approach resulted in a high-stakes gamble.

D. *Eichmann*

Nuremberg was the bedrock upon which was built the next great international[23] criminal prosecution — the 1960 trial before an Israeli court of the Nazi architect of the Western European Holocaust, Adolf Eichmann.[24] Nuremberg served as precedent that Israel's prosecutor, Gideon Hausner, viewed as essential. He stated that in preparation for the trial he "consumed [the forty-two-volume record of Nuremberg] at the rate of a volume per day."[25] The whole Nuremberg record was eventually placed in evidence at Eichmann's trial.

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23. "International" is here used in the sense of a trial taking place in one nation but considering events in another.

24. For a description of how Eichmann was kidnapped from Argentina and brought before the court in Jerusalem, see ISSER HAREL, THE HOUSE ON GARIBALDI STREET (1975).

25. GIDEON HAUSNER, JUSTICE IN JERUSALEM 290 (1966). Unless otherwise noted, my analysis of the *Eichmann* case will be based on the factual material set forth in Hausner's work.

Like Nuremberg, *Eichmann* was conceived not simply as a criminal prosecution but as an opportunity for a didactic proceeding — one that could present the entire story of the Jewish Holocaust, which Nuremberg itself only incompletely addressed. David Ben Gurion, the Israeli Prime Minister, in a letter to the World Zionist Organization, wrote:

> The Holocaust that the Nazis wreaked on the Jewish people is not like other atrocities that the Nazis committed in the world, but a unique episode that has no equal, an attempt to totally destroy the Jewish people, which Hitler and his helpers did not dare try with any other nation. It is the particular duty of the State of Israel, the Jewish people's only sovereign entity, to recount this episode in its full magnitude and horror; without ignoring the Nazi regime's other crimes against humanity — but not as one of these crimes, rather as the only crime that has no parallel in human history.[26]

Hausner shared these views and wrote in his book on the case:

> There was, in fact, much more to it than a desire for a complete record. I wanted our people at home to know as many of the facts of the great disaster as could be legitimately conveyed through these proceedings. It was imperative for the stability of our youth that they should learn the full truth of what had happened, for only through knowledge could understanding and reconciliation with the past be achieved. Our younger generation, absorbed as it was in the building and guarding of the new state, had far too little insight into events which ought to be a pivotal point in its education. The teenagers of Israel, most of them born into statehood or during the struggle for it, had no real knowledge, and therefore no appreciation, of the way in which their own flesh and blood had perished. There was here a breach between the generations, a possible source of an abhorrence of the nation's yesterday. This could be removed only by factual enlightenment.[27]

By committing the *Eichmann* prosecution to telling the full story of the Jewish Holocaust, the Israelis embraced the two-track strategy of Nuremberg and expanded its reach by focusing on a lower level (although still significant) official brought to trial long after the war ended. The Israelis' motivations included a desire to challenge the impression that Europe's Jews had gone meekly to their slaughter. To this end, the prosecution sought to emphasize the heroism of the Jewish victims. Rachel Auerbach of Yad Vashem (the official Holocaust memorial institution of Israel) served as an adviser to the prosecution team. She outlined the sorts of witnesses who ought to be called including, most particularly, those who could describe "deeds of

26. *Quoted in* TOM SEGEV, THE SEVENTH MILLION 329-30 (Haim Watzman trans., 1993).

27. HAUSNER, *supra* note 25, at 291-92.

self-sacrifice, resistance, rebellion, revenge, and flight."[28] Auerbach's approach was adopted.

Although the *Eichmann* prosecution did not have all the advantages that the Allies had at Nuremberg, the Israelis still found themselves in a situation that might facilitate a big didactic trial. The defendant, while not a leading Nazi, was a significant functionary in the ministry that had arranged the deaths of millions of Jews. He was a criminal of the sort who, doubtless, warranted the most severe punishment. Eichmann's work had generated a vast body of incriminating evidence. There was no doubt about his identity or his guilt. Documents and witnesses were available in abundance to prove his connection to murderous operations on an unimaginable scale. Moreover, Eichmann, like his more illustrious Nuremberg Nazi brethren, was a man with no real political protectors. He was not being tried on his home turf and lacked connections with any nation willing to act on his behalf or protect the ideas with which he was associated. He faced prosecution by a modern nation-state with relatively large resources available to prepare its case. Eventually, Eichmann would be defended by one of the same lawyers, Dr. Robert Servatius, who handled the cases of a number of Nuremberg defendants. Servatius had absorbed the quiescent and cooperative style of other Nuremberg defense counsel. He did not set out to challenge the Holocaust or discredit its victims. Moreover, he was a continental lawyer unschooled in the adversarial art of cross-examination.

Eichmann's trial conformed to the Nuremberg pattern. It relied on precisely the same sort of adversarial approach utilized by the Allies in 1945. The Israeli trial court heard evidence that ranged over the entirety of the Holocaust, from early anti-Semitic activities like the Nuremberg race laws and Kristallnacht, to the murderous mass killings in the East by the mobile killing units (Einsatzgruppen) and the operations of the death camps at Auschwitz, Sobibor, Treblinka and the rest. The prosecution incorporated this, and a great deal more, in its vast fifteen count indictment, diligently pursuing two tracks. The first focused on Eichmann. The second encompassed an enormous flood of Holocaust materials that had nothing to do with the defendant in the protective glass booth. Weeks were spent on the Einsatzgruppen and Operation Reinhard (the organized murder of Poland's Jews). Eichmann was not demonstrably connected to either of these criminal activities. Still, the prosecution plowed on. In the end, for one middle rank Nazi official, there were 1400 documentary exhibits (some of them stretching to many thousands of pages), 121 prosecution witnesses and ten months of hearings. The witnesses were a new addition to the two-track didactic criminal prosecution. At

28. SEGEV, *supra* note 26, at 339.

Nuremberg, prosecutors called only thirty-three live witnesses. The *Eichmann* court adopted a virtually identical approach to evidentiary questions as had its forebear. Relevance restrictions were few; hearsay flooded in; and authentication requirements were loosened.

As had been the case at Nuremberg, the Jerusalem trial generally came to be viewed as a legitimate exercise of legal authority, as well as the producer of a compelling narrative about the Holocaust. Again, however, a dangerously expanded and vulnerable process was saved from potential problems by the intervention of a particularly vigorous and fair-minded judge, Supreme Court Justice Moshe Landau, who worked tirelessly to keep the proceedings on track. That his achievement was both difficult and significant is suggested by the abject failure of one of his colleagues on the *Eichmann* bench, Benjamin Halevi, to manage effectively an earlier Holocaust-related matter involving a libel accusation regarding a former Hungarian Jewish official.[29] Part of the reason for Landau's sedulous care may have been the fact that Eichmann had been illegally kidnapped from his hideout in Argentina by Israeli intelligence agents and, at the beginning of the case, the world community was highly critical of Israel's action. For whatever reason, Landau vigorously policed the proceeding, managing to keep it from tilting into damaging excess. At the end of the case, the judges, led by Landau, drafted a judgment that refused to treat Eichmann as the superhuman monster the prosecution had sought to depict and weighed the evidence presented in an evenhanded and persuasive manner.

The *Eichmann* case did more than simply mirror Nuremberg. It redefined the focus of such cases and incorporated a broader array of evidence (most particularly that from victim witnesses). The atrocity materials that had inadvertently become so important at Nuremberg were the conscious heart and soul of the proceedings in Jerusalem. The Holocaust's evidentiary power was grasped and used not simply to resolve prosecutorial trial problems, but as the *raison d'être* of the case. To prove the Holocaust, the Nuremberg documents and films were augmented with the testimony of scores of witnesses. These witnesses presented a number of problems. Some were so emotionally or psychologically damaged as to prove incapable of testifying competently. One fainted on the witness stand and could not continue.[30] Another was assailed by health problems before testifying and failed to respond to court directions once on the witness stand.[31] Some witnesses appeared to use the process to attempt to strike questionable

29. *See* DOUGLAS, p. 156.

30. 3 THE TRIAL OF ADOLF EICHMANN — RECORD OF PROCEEDINGS 1237 (Eng. Trans. 1993) [hereinafter EICHMANN RECORD] (testimony of Yehiel Dinur).

31. 1 EICHMANN RECORD, *supra* note 30, at 499, 517-18 (testimony of Rivka Yoselewska).

blows at Eichmann.[32] Others seemed out to advance their political careers[33] or literary ambitions.[34] All faced difficulties related to the, at least, fifteen year hiatus from the time of the Holocaust to the beginning of the trial.

The *Eichmann* prosecution's vast two-track approach had a distorting effect on the trial. At least one third of the proof (all that concerning the Einsatzgruppen, Operation Reinhard in Poland, the operation of specific concentration camps and the rise of pre-war German anti-Semitism) had nothing to do with Eichmann at all. This meant that something like 40 of the 121 prosecution witnesses were literally irrelevant to the case against the defendant. When documentary evidence, films, and photographs are considered, perhaps as much as half the prosecution's case was irrelevant. Not only was much of the proof irrelevant, the prosecution's conception of Eichmann was inflammatory and distorted. The prosecution chose to argue that Eichmann was second only to Hitler in responsibility for the Holocaust. This claim was patently ridiculous. Eichmann had been a mid-level functionary. Ranged above him were the great monsters of the Third Reich including Himmler, Heydrich, Bormann, Frank, Höss and the rest. Eichmann was a murderous bureaucrat, not a blood-spattered monster.[35]

The stakes the Israelis risked in trying Eichmann in the manner they did were enormous. By abducting the defendant from Argentina, Israel had challenged the world political order. If Eichmann were exonerated, or Israel shown to be a lawless state willing to indulge in a fraudulent show trial, the consequence would have been international ostracism. Moreover, if Eichmann were not persuasively proven guilty, the entire Israeli effort to have the Holocaust taken more seriously, both at home and abroad, would have been profoundly damaged. Mounting this enormous two-track prosecution meant risk of the most substantial sort, as well as enormous financial expense.

32. 1 EICHMANN RECORD, *supra* note 30, at 455-66 (testimony of Abba Kovner sprinkled with improbable and emotion-laden material aimed at damning Eichmann).

33. 3 EICHMANN RECORD, *supra* note 30, at 1123-27 (testimony of Zvi Zimmerman, a member of Parliament, found to have virtually no relevance to the case).

34. 2 EICHMANN RECORD, *supra* note 30, at 709 (testimony of American judge Michael Musmanno described by defense counsel as "a publicist traveling from place to place gathering material with a view to publication").

35. *See generally* HANNAH ARENDT, EICHMANN IN JERUSALEM — A REPORT ON THE BANALITY OF EVIL (1963). Arendt's account of the Eichmann trial, however, has come under serious criticism. *See* JACOB ROBINSON, AND THE CROOKED SHALL BE MADE STRAIGHT (1965).

E. *Demjanjuk*

The Nuremberg two-track approach was not abandoned after *Eichmann*. Rather, it was refined and expanded upon when Israel returned to the question of Holocaust criminality in the trial of John Demjanjuk in 1987.[36] Demjanjuk was accused of having been Ivan "Grozny,"[37] the particularly vicious operator of the gas chamber apparatus at the Treblinka death camp in Poland during the Second World War. After lengthy denaturalization and extradition proceedings in the United States (where Demjanjuk had been living for many years), the defendant was extradited to Israel for trial. Both the United States and Israel appeared hopeful that Demjanjuk's prosecution and conviction would usher in a new era in which Nazi murderers would finally (more than thirty-five years after the end of World War II) be punished for their crimes.[38] This increased desire to see Holocaust criminals punished was a reflection of changing attitudes in both the United States and Israel.[39] The attractiveness of prosecution was enhanced by the fact that the passage of time was rapidly thinning the ranks of Holocaust survivors who could identify criminals and provide live testimony at their trials. As Michael Shaked, one of the Israeli prosecutors, declared in his opening remarks:

> There can be no doubt, this may be one of the last trials where it is possible to bring to the stand witnesses who can say, "We were there, we saw what happened with our own eyes. We can testify as to what happened."[40]

The *Demjanjuk* prosecution was also, at least in part, motivated by an Israeli desire to distract attention from the Palestinian *Intifada* then raging, by re-presenting the story of the Jews' suffering at the hands of the Nazis. With all this in mind, it is not hard to see why the two-track grand narrative approach pioneered at Nuremberg and refined in *Eichmann* was again deployed.

Unfortunately, *Demjanjuk* was not the sort of case that could easily support such an approach. Ivan the Terrible, whoever he was, was not a major figure in, or architect of, the Holocaust. He was simply one of its bestial foot soldiers. In contrast to prior cases, the *Demjanjuk* pretrial investigative work was slipshod and incomplete — emblematic of the case's start as a relatively minor matter. The victim witnesses who were relied upon for identifications had been handled

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36. Unless otherwise noted, my analysis of the Demjanjuk case will be based on the factual material set forth in TOM TEICHOLZ, THE TRIAL OF IVAN THE TERRIBLE (1990).

37. "Grozny" translates into English as "Ivan the Terrible." *Id.*

38. *See* DEMJANJUK V. PETROVSKY, REPORT OF THE SPECIAL MASTER 146-47 (1993).

39. *See* ALLAN A. RYAN, JR., QUIET NEIGHBORS (1984).

40. *Quoted in* TEICHOLZ, *supra* note 36, at 103.

in a careless manner (particularly with respect to suggestive photo arrays) that substantially increased the risk of erroneous identification.[41] The American prosecutors, who conducted much of the preliminary investigation (in support of their denaturalization effort), employed a narrowly focused "hardball" approach to the proof that deprived the defense of critical information and lent a misleading air of certainty to the case.[42]. There were no document troves from which to cull damning evidence. In fact, there was only one document that directly connected Demjanjuk with the death camps, the Trawniki camp identity card. This card did not even tie Demjanjuk to Treblinka but rather to a different death camp, Sobibor. That Demjanjuk was not tried until more than 40 years after the end of World War II only added to the difficulty. This meant that memories had likely faded and all available witnesses were likely exposed to a variety of suggestive experiences, including testimony at prior trials, exposure to media reports, participation in various memorial activities, as well as tainted investigative efforts. Finally, the quiescent defense counsel who had generally been in charge at Nuremberg and during Eichmann's case had been replaced by aggressive, publicity hungry American and Israeli advocates well versed in adversarial techniques, if not the evidence in the *Demjanjuk* case. The cooperative spirit with which the earlier trials had been managed no longer existed. Instead, a resounding clash between prosecution and defense could be expected.

The special three-judge Israeli court that tried Demjanjuk followed in the footsteps of its two-track predecessors. The adversarial burden to produce evidence was placed squarely on the shoulders of the parties. The prosecution sought, once again, to present a narrative of the Holocaust. To this end, it used materials presented at previous trials, elaborate expert analyses and a great deal of victim witness testimony. The prosecutors went about their job with the utmost zeal. They cast Demjanjuk in the role of villainous mass murderer. In their zeal, they seemed to ignore the possibility that Demjanjuk was not Ivan the Terrible. The court used the same loose approach to evidence that had been adopted in Nuremberg and *Eichmann*. Relevance was ignored, hearsay embraced and authentication requirements abandoned. Even cautionary rules designed to ensure the integrity of eyewitness identifications were disregarded. The court, as a matter of principle, adopted the view that the victim witnesses had suffered so deep a trauma that it was impossible for them to forget their experiences or the identity of their tormentors.

41. *See* WILLEM A. WAGENAAR, IDENTIFYING IVAN: A CASE STUDY IN LEGAL PSYCHOLOGY (1988).

42. *See* Demjanjuk v. Petrovsky, 10 F. 3d 338 (1993).

The resulting trial was a sprawling and contentious affair that ran for more than a year. Unfortunately, there was no great judge to guide and protect the proceedings. The pedestrian panel hearing the case placed excessive reliance on the victim witnesses and was eventually shown to have misbehaved in its relations with the press. Despite several warning signals, the court wholeheartedly embraced the proof suggesting that Demjanjuk was Ivan the Terrible and dismissed out of hand anything pointing in the other direction. The prosecution's zeal knew no bounds. Prosecutors seized virtually every available opportunity to strike blows at both the defendant and his counsel — including the incendiary accusation that the defense and some of its witnesses were associated with Holocaust denial groups. The prosecutors painted the defendant as a monster of the most profound depravity. No opportunity to attack his character was missed.

Demjanjuk's defense team, particularly its two American members, was simply inadequate to the task of representing the target of so vast and controversial a case. Their interrogation of victim witnesses was insensitive and infuriated both onlookers and the court. The experts they called were, for the most part, shown to be charlatans or incompetents. They dismissed evidentiary sources (particularly those from behind the Iron Curtain) that would eventually prove critical to the case. They were so distracted by the media coverage of the trial that they often lost sight of their client's best interests. As the trial progressed, the pressures of the case, and their lack of adequate skill and preparation, led Demjanjuk's American lawyers to veer toward simplistic claims tinged with Holocaust denial. When the trial eventually spun out of control, the Demjanjuk family decided to fire the American lawyers and place their full reliance on Yoram Sheftel, the sole Israeli advocate on the team. Sheftel, while clearly more competent, was not particularly effective. He was so combative that he eventually came to be viewed as perhaps the most hated man in Israel.[43] While the defense team's weaknesses caused much of its difficulty, the pressures generated in resisting a two-track didactic prosecution are likely to push even the best of defenders into denial of historical facts and victim denigration.

The result of all this was a travesty of justice. The court convicted Demjanjuk and wrote an opinion it declared to be a tribute to the victims of the Holocaust, "a monument to their souls, to the holy congregations that were lost and are no more, to those who were annihilated."[44] All doubts and questions were summarily swept aside in the fervor to pay homage.

43. *See* YORAM SHEFTEL, DEFENDING IVAN THE TERRIBLE (1996).

44. THE DEMJANJUK TRIAL 39 (Asher Felix Landau ed., 1991).

Demjanjuk appealed his conviction and as the case ground slowly ahead, evidence raising the most serious questions about the accuracy of the decision began to surface. Witnesses came forward to say that Ivan the Terrible was really a man named Marchenko. Others presented proof that Demjanjuk had been stationed at Sobibor and a number of other camps, but never at Treblinka. Information became available that the identifications relied upon by the Jerusalem District Court were tainted and might be erroneous. Eventually, the Supreme Court of Israel declared that the conviction was unsound, had to be reversed, and Demjanjuk freed. There was a public outcry in Israel because a man shown to have been a camp guard was being released, however, the lack of clear proof and the appearance of judicial blunder seemed to foreclose any other choice. The failure of the *Demjanjuk* prosecution struck a fatal blow to Holocaust prosecutions in Israel — there would be no more. The stakes had been raised so high that there was no way to go on once the *Demjanjuk* effort was discredited. The miscarriage of justice produced by too light a regard for basic safeguards about evidence and identifications had destroyed the legitimacy of the prosecutorial effort.

Despite the *Demjanjuk* disaster, the two-track didactic case model invented at Nuremberg has not been abandoned. It was used with disastrous consequences in the Canadian trial and acquittal of Imre Finta, a Hungarian Gendarme Captain allegedly responsible for the loading of Jews onto trains bound for the extermination camps.[45] Far more seriously, it has been used as the model for the early prosecutions mounted by the ICTY and ICTR. The first full-scale trial at the ICTY, that of Dusko Tadic, was marked by a strikingly similar approach.[46] The trial in that case dragged on for more than a year, focused more on Serb policy than on the defendant, utilized exceedingly lax rules of evidence and eventually faced extremely serious witness problems, including the demonstrated perjury of a witness introduced into the proceedings through the machinations of the Bosnian Muslim government. While Tadic was properly convicted, the process used holds little promise of becoming an effective and reliable prosecutorial mechanism. There were similar difficulties in the ICTR trial of Jean-Paul Akayasu.[47] Even the Rome treaty outlining the nature of the International Criminal Court seems to contemplate a Nuremberg-like process with didactic trials, loose evidence rules, and robustly adver-

45. R. v. Imre Finta, 1994 S.C.R. 265 (Can.).

46. My discussion of the Tadic case is based upon MICHAEL P. SCHARF, BALKAN JUSTICE (1997).

47. *See* Judgment, Prosecutor v. Akayesu, Case No. ICTR-96-4-T (Sept. 2, 1998 International Criminal Tribunal for Rwanda), *available at* http://222.un.org/ictr/english/judgments/akayesu.html.

sarial procedures.[48] Nuremberg was a powerful and positive precedent in international law. It has, however, had a decidedly negative impact on international criminal *procedure*, inhibiting development of a more effective, efficient and careful sort of courtroom process. Such an approach heightens not only the *risk* of failure but also the *cost* of failure. Even success can come with a prohibitively high price tag.

II. BASS, DOUGLAS, GOLDSTONE AND ROBERTSON

A. *Bass*

Gary Bass has written a first rate scholarly volume about when and why international tribunals are likely to succeed. At the heart of his book are five case studies including both successful and failed prosecutorial efforts. Among the former are Nuremberg and the ICTY, while the latter include international efforts to deal with Napoleon, Kaiser Wilhelm II, and the Turkish leaders responsible for the Armenian massacres. These nuanced and detailed historical studies forcefully remind the reader of the point made by George Santayana that "[t]hose who cannot remember the past are condemned to repeat it."[49] Bass helps us remember this particular and important past, thereby increasing the likelihood that we may learn from it in pursuing international justice in the future.

Bass argues that liberal states are not always likely to support international tribunals. They will sometimes, however, be willing to do so. Understanding when is key to assessing the likelihood of a tribunal's success. On the basis of his five case studies, Bass concludes that prosecution is most likely to work if three critical conditions are met. His first and second conditions emphasize the "selfish" concerns of potential prosecutors about the welfare of their own citizens. If resistance to arrests or trials is likely to lead to a significant risk that soldiers or civilians of the prosecuting nations will be injured, then the prospects for trial are dramatically reduced. Conversely, if the crimes charged arise out of the infliction of serious harm on soldiers or civilians of the prosecuting nations then the chances for trial are substantially enhanced. Bass's third point is that prosecution is often tied to political sentiment in the prosecuting nations. If a wide segment of the populace shares a sense of outrage about an alleged crime, prosecution is far more likely. While none of these points is meant to be an ironclad rule, together they have substantial explanatory power with respect to Bass's case studies. Prosecution failed in Turkey and was placed in serious jeopardy at the ICTY because the Western democra-

48. *See* Leila Madya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000).

49. *See* SANTAYANA, *supra* note *.

cies faced risks to their own troops and citizens in making arrests and conducting trials. The prospects for prosecution were boosted at Nuremberg because there were no such risks, and because the Nazis had committed heinous acts that affected the citizens of all the nations involved in the IMT.

Stay the Hand of Vengeance is strongest on the historical background to the trials and trial efforts examined. The book is full of interesting and illuminating insights about the politics that surrounded each case. Bass presents a great deal of little known information about the treatment of the defeated Napoleon — especially about the protective role played by the Duke of Wellington with respect to his defeated adversary. Perhaps the strongest and saddest section of the book considers the failed prosecution of the perpetrators of the Armenian genocide. The consequences of that failure reverberate to this day. Bass traverses more familiar ground with respect to Nuremberg and the ICTY but still uncovers valuable information. About Nuremberg, Bass informs us that its key American sponsor, Secretary of War Henry L. Stimson, was not only motivated by his sense of fair play in insisting upon trials but by a "genteel antisemit[ism]" (p. 174) that led him to oppose the draconian proposals of the Jewish Treasury Secretary, Henry Morgenthau, Jr. With respect to the ICTY, Bass reminds us that its creation was an admission of Western failure to stop a clearly identified human rights catastrophe, and that it was saved from ignominious failure, in good measure, by the courageous and skillful efforts of several American diplomats including most particularly "the mother of all tribunals," (p. 262) Madeleine Albright.

Bass's book does not assign itself the task of looking closely at the trials that were the results of consummated international agreements to prosecute. His position seems to be that such trials can be very important because they may "help bring out the truth" (p. 144). He does not address the problems inherent in such trials when they become lengthy recitations of general history. He does, however, note the particular problems raised by the prosecution of Dusko Tadic in the ICTY, a case that focused on an insignificant defendant of no real importance in the Balkans drama. Bass remarks on the incredible slowness of that trial, its reliance on marginal evidence, and the prosecutors' need to abandon certain charges and renounce the testimony of certain witnesses.

B. *Douglas*

Lawrence Douglas in *The Memory of Judgment*, does concern himself with an examination of the details of several international criminal prosecutions. His book, like Bass's, is anchored in a series of powerful and well-researched case studies including the Nuremberg trial, as well

as those of Adolf Eichmann and John Demjanjuk.[50] Douglas's objective is to examine whether trials, most particularly those involving the events of the Holocaust, can serve more than just the "juridical" (p. 174) goal of proving the guilt or innocence of an accused defendant. Douglas asks whether the didactic two-track trial born at Nuremberg can serve a number of grander social objectives including the creation of a lasting historical record, the achievement of "collective catharsis" (p. 110), and the establishment of "heroic memory" (p. 154). He takes the position that trials about the Holocaust have successfully served all these ends and rejects the notion that trials should be strictly juridical.

Douglas begins his work with a careful analysis of the background to, and proof used at, the Nuremberg trial. He pays particular attention to the American prosecution film, *Nazi Concentration Camps*. Douglas, however, reminds us that Nuremberg did not start as a Holocaust or atrocity case but, instead, was conceived primarily as an effort to punish Nazi militarism and crimes against peace. As a result the main evidentiary focus (at least by the Americans) was Nazi aggression rather than the plight of the victims of atrocities. To serve that end, the American team sought to present a huge array of Nazi documents while relegating live witnesses (most particularly victims) to a far inferior position. Douglas stresses the transformative impact of *Nazi Concentration Camps* and other atrocity evidence. He nicely demonstrates the dramatic shift in focus as displayed in the closing argument of the chief British prosecutor, Sir Hartley Shawcross. Instead of pursuing the earlier themes of the British case, Shawcross concentrated on a heart-rending affidavit written by Hermann Gräbe describing the slaughter of innocent Jewish men, women, and children by a Nazi death squad. Douglas says of this speech: "It was as if the prosecution itself had finally absorbed the significance of its own terrible evidence and, in so doing, had come to recognize the insufficiencies of the legal case meant to contain it" (p. 93). Douglas argues that the experience of the Nuremberg trial reoriented international prosecution and infused it with a concern to remember and memorialize the Holocaust.

The Memory of Judgment presents this transformation as an appropriate one that eventually resulted in the *Eichmann* prosecution where Holocaust memorialization moved to the acknowledged center of the trial. The didactic elements of the case were recognized and embraced by an extremely zealous Israeli prosecution team and substantially strengthened by the use of 121 live witnesses — most of them Holocaust survivors. The goal was not simply to convict Eichmann but to address the terrible trauma caused by the Holocaust

50. Douglas also focuses on the Canadian trial of a Holocaust denier named Ernst Zundel. Pp. 212-13.

and rehabilitate the reputation of its victims. This project clashed with traditional notions of relevance and led to sharp clashes between the court (which sought traditional juridical goals) and the prosecution (which labored mightily to tell the whole Holocaust story). Douglas finds that the efforts of court and prosecution balanced each other and resulted in a case that was both effective in convicting Eichmann and capable of addressing the Holocaust, in other words, a trial record that could "condemn the accused and . . . acquit his victims" (p. 154). It was also a record that could kindle interest in Holocaust prosecutions around the world.

This well-reasoned and thoughtful analysis of the *Eichmann* case is far from uncontroversial. As early as the time of the trial itself, powerfully intelligent critics like Telford Taylor and Hannah Arendt were sharply critical of Israel's approach. Arendt in particular was disturbed by Israel's adoption of the two-track approach, viewing it as a betrayal of the juridical mission. While Douglas presents forceful counters to Arendt's arguments, one cannot help but recall that *Eichmann* set the pattern that would result in the *Demjanjuk* debacle. Douglas seeks to address *Demjanjuk* by suggesting that the court took the didactic effort too far. It is hard to see how such a problem can be avoided except by extraordinarily sensitive and fairminded judges. The risk of judicial bias and hazard of distraction (because of a parade of irrelevancies) are inherent in the two-track approach. Moreover, as Douglas points out, errors "in trials staged as didactic spectacles, rituals of justice designed to place the institutions of criminal justice in the fore of the public's mind . . . seem more consequential" (p. 206). In fact, *Demjanjuk* not only brought Israeli Holocaust prosecutions to an end but, Douglas suggests, may even have helped fuel Holocaust denial since it is a short step from witness errors about Ivan the Terrible to witness mistakes about the Holocaust itself.

Douglas goes on to look at other cases affected by Holocaust-related issues. He particularly focuses on a Canadian case involving a Holocaust denier named Ernst Zundel (pp. 212-13). Even here, outside the realm of crimes committed during the Holocaust, the problems of the two-track didactic trial can be observed. The Canadian courts that considered the *Zundel* case were unsettled for years by the myriad of evidentiary problems generated. Although the *Eichmann* case may have been "an extraordinary success" (p. 260), in many ways, it was also an invitation to the development of courtroom processes and attitudes that became increasingly unmanageable, unpredictable, and unsatisfactory. The course that yielded the *Demjanjuk* disaster was charted in *Eichmann*. The law grows by experience and precedent. Where *Eichmann* pointed, *Demjanjuk* and other cases followed, creating an ever more fragile, costly, and risky process.

C. *Goldstone*

In 1994, Richard Goldstone was chosen to be chief prosecutor of the ICTY. He was selected after a great deal of political wrangling in circumstances that raised substantial doubts about whether international prosecution in the Balkans could succeed. In significant part due to his efforts, the ICTY shifted from an aspirational entity with few cases to a serious instrument of justice. In his memoir, *For Humanity*, Goldstone describes the process leading to the ICTY's transformation and also provides a number of insights on the progress of democracy and justice in Goldstone's native South Africa.

One of the things that Goldstone's memoir makes quite clear is the impact of the Nuremberg precedent on the formation of the ICTY and the thinking of its chief prosecutor. At the outset of his discussion of the ICTY, Goldstone notes "the importance of the legacy of the Nuremberg trials" (p. 75). He describes its holdings about jurisdiction and crimes against humanity as fundamental. He embraces Nuremberg's two-track approach most particularly with respect to the creation of a historical record in the courtroom. The connection between the ICTY and Nuremberg also comes through strongly when Goldstone discusses why a tribunal was created with respect to Yugoslavia but not in the aftermath of the war in Iraq. Judge Goldstone begins by pointing out that Yugoslavian ethnic cleansing reminded the Western community of the Holocaust, and that photos of the Bosnian prison camps were uncomfortably similar to those made infamous at Nuremberg. All of this — and the European location of the Balkan atrocities — challenged the Western democracies on their home ground with a vile Nazi-style racism of the sort that had been condemned in 1945. The absence of these factors with respect to Iraq made it appear a far less appealing venue for the creation of a lasting historical record by means of an international tribunal.

Goldstone's book is particularly illuminating regarding the difficulties in getting an international prosecution under way. He identifies a number of problems that must be resolved. Perhaps foremost among these is the organizational effort required to build up a prosecutor's office. By Goldstone's estimate, such an effort takes at least 18 months. Delay of the sort required to accomplish such a project erodes credibility and increases evidence-gathering problems. Evidence gathering presents other difficulties as well. To effectively prosecute high-ranking defendants, let alone present a grand historical narrative, requires a significant supply of evidentiary information. To get that information requires international cooperation. In the case of the ICTY, Goldstone concluded that he needed a significant volume of information from American and British intelligence sources. The CIA and others were loath to turn such information over and a protracted institutional battle with friendly governments ensued. The same sort of

problems arose with respect to the willingness of NATO forces to arrest those indicted by the ICTY. It was only after extensive struggle and political shifts that any significant number of defendants was taken into custody.

Goldstone highlights a number of other institutional problems as well. International prosecutions on a grand scale demand a grand budget. Securing such a budget is a politically daunting task. Goldstone describes in detail his budget battles with a United Nations ("UN") bureaucracy that did not want to fund the prosecutorial effort adequately and sought to use funding as an instrument of control. The judges appointed to the ICTY also threatened prosecutorial independence. Many of them were the products of inquisitorial rather than adversarial justice systems. In the former, courts often have the power to direct and manage prosecutorial operations. Despite the adversary nature of the rules of the ICTY, a number of judges sought to impose their views about the pace and scope of prosecution on Goldstone's office. The chief prosecutor's memoirs suggest just how political the commencement of international prosecution can be. Goldstone, schooled in the task of transitional justice by his experiences in South Africa, was up to the task of making the ICTY a real and functioning prosecutorial mechanism. He, however, needed a great deal of help. Among his allies were the American diplomats Madeleine Albright and David Scheffer. Goldstone left the ICTY to return to South Africa before the prosecutors in The Hague had mounted many cases. His memoirs provide valuable insights into the struggles and difficulties of setting up an effective international justice mechanism.

D. *Robertson*

Geoffrey Robertson's book is an extended effort to chart the rise of crimes against humanity as a prosecutable offense. Unfortunately, it is not carefully grounded in history, and seems to have been written more as a polemic than as scholarly work. Both Bass and Douglas are painstakingly careful in assembling the facts upon which they base their case studies. Robertson eschews careful factual analysis and consequently fails to build a solid foundation for his argument. As early as the Preface to his work, Robertson shows disregard for the need to support debatable propositions. In the Preface, Robertson indicates that it was the Holocaust that "called forth an international tribunal — the court at Nuremberg" (p. xiv). This is not an absurd claim but it cries out for support of some sort. None is forthcoming. A careful look at the matter suggests that there were a number of other and stronger motives for Nuremberg's creation, including Roosevelt's and Stimson's concerns about revisionism, the strong American "legalistic-

moralistic" mind set,[51] Stalin's desire to destroy Nazi credibility, and a number of others. As to the impact of the Holocaust, so centrally-placed a prosecutor as Telford Taylor has said that it was not until he was in the midst of the Nuremberg trial that he began to appreciate the "full scope of the Holocaust."[52] Douglas documents the rising appeal of atrocity evidence over the course of the Nuremberg trial. It was only as the trial neared its conclusion that the Holocaust moved toward center stage. It is simply not good writing or thinking to breezily declare that Nuremberg was rooted in the Holocaust.

Robertson's lack of care extends to factual claims of less exalted status as well. He states that the first (American) concentration camp film shown at Nuremberg was "newsreels of Auschwitz and Belsen" (p. 215). This description is wrong on several counts. The film was not "newsreels" but the creation of Hollywood director George Stevens, and it did not contain any footage showing Auschwitz.[53] Similarly, Robertson unqualifiedly states that "crucial documents" (p. 240) presented at the *Demjanjuk* trial were forgeries (in context this can only be read as a reference to the Trawniki document). The parties at the *Demjanjuk* trial spent 8000 pages of transcript and more than 100 court sessions on that question. There is no consensus on the point, though every American and Israeli court that ever ruled on the matter found the Trawniki card genuine.[54]

Aside from documentation problems, Robertson's work is marred by a simplistic heroes-and-villains view of events. Non-governmental organizations ("NGOs") are virtually always on the side of the angels, while diplomats and politicians are almost always venal. That this is unfair to people like Madeleine Albright and David Scheffer, to name but two, is rather clear. Robertson is also prone to fits of hyperbole. He describes the Chilean dictator Augosto Pinochet as responsible for "[t]he century's most vicious human rights violation" (p. 41). Such a claim is simply absurd in light of the crimes of Hitler, Stalin, Mao, and Pol Pot, to name but a few. This is not to suggest that Pinochet is an innocent, but rather that a more finely calibrated argument might have enhanced the credibility of Robertson's presentation. Given all of these flaws, it is hard to credit Robertson's work. Fair description and measured analysis are essential if we are to learn history's lessons.

51. GEORGE KENNAN, AMERICAN DIPLOMACY 1900-1950, at 95 (1951).

52. TAYLOR, *supra* note 14, at xi.

53. *See* DOUGLAS pp. 27-37 (providing a detailed description of the provenance and content of *Nazi Concentration Camps*).

54. *See* TEICHOLZ, *supra* note 36, at 166-77, 251-56.

III. TWO SUGGESTIONS

About 25 years ago the great British historian, E.P. Thompson, wrote *Whigs and Hunters*,[55] a book describing a war that raged in the forests and pastures of rural England in the 1710s and 1720s. That struggle was mounted by small landholders and forest dwellers in an effort to protect their traditional rights in open or common land against the property claims of Whig patricians who sought to seize and enclose the land. The combatants were not well matched and the wealthy won a good deal more often than they lost. Yet they did not always win.[56] Thompson, an avowed Marxist, began his study of this woodland confrontation convinced that he would find that the law was simply one more instrument by which the rich oppressed the poor. What he found, however, surprised him. Although the well heeled often succeeded, legal cases were not a sure thing for them and, in fact, the law grew in ways that progressively hemmed in the options of the powerful. Thompson, in the moving final chapter of his book, referred to this process as the growth of the rule of law and saw it as the instrumentality by which British society slowly and painfully grew toward true democracy. He also saw it as the wellspring of both Gandhi's and Martin Luther King's power to overcome institutional injustice.

One thing that is missing from Bass's and Douglas's otherwise excellent works is any theory of why international law appears to be growing into an ever more effective tool in punishing gross criminal disregard for human rights. For Bass, what seems to be posited as an explanation for recent developments is a convergence of factors that foster prosecution. When these are not present, legal action should not be expected to succeed. For Douglas, each case addressing the Holocaust is presented as a more or less unique artifact that may succeed or fail depending on the balance of forces pulling toward juridical limits and didactic narrative. What is missing from both these views is any explanation or deeper appreciation of the apparent *growth* of international willingness to pursue criminals. Thompson's conception of the growth of the rule of law provides a powerful insight into why global receptivity has increased. It also helps us understand why the trajectory of trial developments over time is important. That trajectory or history can strengthen the limits on human rights abuse. The process, however, is not ineluctable. To encourage the growth of legal con-

55. EDWARD P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975).

56. *See, e.g.*, *id.* at 136 (tenants successful at Winchester Assizes on question of cutting beech trees); *id.* at 51 (grand jury refused to indict local landowner accused of interfering with red deer in Windsor); *id.* at 79 (despite vigorous prosecution, many defendants were acquitted in criminal proceedings at Wallingford).

straints, the importance of each case in reinforcing the power of law must be appreciated. In this light, the risks inherent in the Nuremberg/*Eichmann* approach must be recognized and corrected. The fact that this was not done in cases like *Demjanjuk* threatens to undermine progress.

One alternative to criminal trials discussed by all four authors is the truth commission — a body charged with the duty of uncovering the truth about certain historical events rather than prosecuting specific defendants.[57] The truth commission separates the second of the two Nuremberg tracks from the effort to prosecute and makes the creation of an accurate record an end in itself. The authors of all the books under review are skeptical about the value of truth commissions as a substitute for prosecutions.[58] But all note that the truth commission idea is one that has been repeatedly suggested and, sometimes, tried. Bass reports that after World War I, when the British and French were pushing for the prosecution of the Kaiser, the Americans (who were opposed to the trial idea) proposed instead "an International Commission of Inquiry be instituted to investigate and report upon the extent of the responsibility of the ex-Kaiser" (p. 101). This proposal was rejected as an unsatisfactory substitute for a trial, a conclusion with which Bass seems to agree. Wilhelm II was never prosecuted and no definitive record of World War I misdeeds was ever created.

Douglas too considers truth commission proposals, most particularly that made by Karl Jaspers in response to the *Eichmann* trial. Jaspers saw the *Eichmann* case as presenting a problem beyond the competence of a normal court of law and suggested that it might "be wonderful to do without the trial altogether and make it instead into a process of examination and clarification" (p. 175). Douglas rejects the Jaspers proposal as lacking the legitimacy and closure of a true legal proceeding. For Douglas, effective "pedagogy" (p. 175) cannot be achieved by entities like truth commissions. He recognizes the risk of distortion engendered by combining pedagogy with prosecution but thinks such risks are worth taking — the *Demjanjuk* example notwithstanding. Goldstone for his part praises the South African Truth and Reconciliation Commission ("TRC") as critical to that nation's transition to democracy but is at pains to emphasize the special healing power of ICTY prosecutions. Finally, Robertson dismisses truth commissions as incapable of addressing serious human rights abuses. He sees them as an inadequate response to extreme criminal conduct and

57. *See generally* Priscilla B. Hayner, *Fifteen Truth Commissions — 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q. 597 (1994).

58. The one possible exception is Justice Goldstone, who emphasizes the value of South Africa's Truth and Reconciliation Commission. Pp. 59-73. He, however, highlights the need for prosecutorial action in the Balkans. Pp. 74-119.

declares "transitional justice [including truth commissions] is a contradiction in terms" (pp. 270-71).

While there is merit to all the authors' criticisms of truth commissions, there is also a great deal to recommend such bodies. They may be brought into being fairly quickly after transition to democracy or the end of hostilities. They are not bound by the legal constraints that require the highest standard of proof for individual conviction. In situations where thousands of victims and potential defendants may exist, truth commissions can address vast numbers of individuals and help begin their reintegration into society. Goldstone makes this precise point when he notes that the South African TRC heard 20,000 victim witnesses and received 8,000 applications for amnesty. Goldstone concludes that "the same result [could not] have been achieved through the normal criminal process. It would have taken scores of long and costly trials to have recorded the history of the human rights abuses perpetrated during the apartheid era" (p. 71). With this background in mind, Goldstone suggests that there might be a place for *both* a truth commission and trials in the Balkans.

Out of this final Goldstone observation a new strategy with regard to two-track trials might be formulated. Rather than encumber each criminal trial with the costly and risky obligation of proving the vast and complex nature of atrocity, why not use a single truth commission proceeding for that purpose? Such a trial could fairly safely be conducted with relaxed evidence rules because no defendant would be directly threatened by either erroneous factual findings or prejudice. The commission charged with such a task would obviously need broad investigative powers and ample staff. It would need both prosecutorial and judicial independence from any interested party. It would also need an effective defense staff comprised of appropriate interveners and/or "devil's advocates" to guard against distortion and fabrications. The findings of such a body might warrant judicial notice in later proceedings. Such notice could operate in the manner contemplated by Federal Rule of Evidence 201 — establishing certain propositions as accurate and reliable.[59] Room, however, might be left for an individual defendant in a later case to challenge personally incriminating findings. Such a procedure could decouple the two-track process while serving both prosecutorial and pedagogic goals.

59. *See* FED. R. EVID. 201.

HOW THE CORPORATION CONQUERED JOHN BULL

*A. W. Brian Simpson**

INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION 1720-1844. By *Ron Harris*. Cambridge: Cambridge University Press. 2000. Pp. xvi, 331. Cloth, $60.

This is a study of the evolution of the forms of business organization during the industrial revolution. Historians never fully agree about anything at all, and often with good reason, but there is really no doubt that the period covered by this book is one that saw major changes in agricultural and industrial production, and in commercial practice and organization. It is convenient to refer broadly to the changes which took place in terms of a revolution, industrial, agricultural, or less commonly, commercial in nature.

Long before the starting date for this study, which is the date of the Bubble Act of 1720, there had existed firms of one kind or another, which had engaged in production, commerce, and consumption. The oldest form taken by the firm is the family. There existed in medieval and early modern England numerous other important legally recognized associations or collectivities, such as households, guilds, colleges, universities, Inns of Court and Inns of Chancery, convents, cities, boroughs and charitable foundations, such as hospitals. The typical form of association employed for business purposes was the partnership. But in the course of the sixteenth and seventeenth centuries, the institution of the corporation, which was conceived to possess a personality distinct from that of its members, and which had evolved outside the commercial world, came to be employed for business purposes.

In the same period the Court of Chancery invented the conception of the trust, an institution to some degree modeled on the earlier medieval institution of the use. In origin quite unconnected with the commercial world, the trust could, potentially, be adapted for use in the commercial field, though this development was not to take place until the eighteenth century.

The main emphasis of Ron Harris's *Industrializing English Law: Entrepreneurship and Business Organization 1720-1844*[1] is on the

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1. Ron Harris is a Senior Lecturer of Legal History at the Tel Aviv University School of Law.

forms of commercial group organization, some incorporated, some not, which were available to the business community after 1720, in particular during the industrial revolution. Harris provides a full chapter devoted to the pre-1720 business corporation, which was mainly associated with overseas trade and monopoly. Two distinct forms of business corporation evolved — the regulated corporation and the joint stock corporation. In the case of the regulated corporation, unlike the joint stock corporation, members of the company traded with their individual stock, and the company provided the infrastructure necessary to make the venture successful. It was possible for incorporation to depend upon prescription, but business corporations mainly came into existence by way of grant or concession from the state, operating either through a Crown charter or the issue of letters patent under the prerogative, or through an Act of Parliament to which the Crown assented. There existed no right to incorporation; incorporation came about as a consequence of negotiations between entrepreneurs and the Crown, and was a privilege. Most business activity was conducted by individual entrepreneurs or by entrepreneurs operating in partnership, not through business corporations.

At the end of the day, the winner was, of course, the joint stock corporation with limited liability. It supplanted the partnership as the typical form of business organization, differing from the partnership, in earlier times the dominant form, by possessing independent legal personality, transferable assets, limited liability, and an internal hierarchical management structure. Associated with the rise of the joint stock corporation was the evolution of organized markets in which stock could be traded, along with government bonds. A school of thought attributes the triumph of such corporations over the partnership to their superior efficiency. As Harris points out (p. 22 n.19), this conception of efficiency is somewhat differently analyzed by lawyers, by economists, and by law and economics scholars, but all those who rely on the concept of efficiency as the basic tool of explanation present the modern corporate form as being "of phenomenal importance for the rise of modern industrial capitalism" (p. 23). It is thought to possess as dramatic an importance in Western history as "the discovery of America or the invention of the steam engine" (p. 23). So if you want to know how the West grew rich, and think it has something to do with the institutions of the law, study the invention of the modern corporate form of business organization.

Those devoted to universalizing the explanatory power of efficiency tend to present the historical process as driven by a sort of inevitability; other forms of business organization, which lose out in the process, resemble giraffes with medium-length necks, doomed, if they ever existed at all, not to make even cameo appearances on the Discovery Channel or amongst the wildebeest on the Serengeti Plains. Harris is an economic historian, and historians are by disposition un-

easy with historical inevitability. He also sets out to give an account of triumph of the joint stock corporation by combining insights derived from general historical writings, from the writings of economists and economic historians, and from legal historians. He has no inclination to write winners' history, but rather to explain a complicated process of evolution over time. He suspects that a belief in the driving force of efficiency, which for some odd reason triumphs only in the nineteenth century, though presumably it was around since the beginnings of time, does little by itself to illuminate a complicated story. At the same time he has no wish to neglect the importance of the concept, and is by no means uninterested, as many historians have been, in general theoretical explanations of historical change.

So his book opens with a valuable analysis of the literature that addresses the relationship, if there is one, between legal and economic development. Harris argues that, in the main, this literature adopts, to a greater or less degree, one of two contrasting paradigms or, in Max Weber's terms, relates explanation to two contrasting ideal types. According to one paradigm, the law and the legal system are viewed as relatively autonomous. Legal change, when it occurs, is managed by an elite group of professional lawyers, and in particular by the tiny coterie of judges. It is driven by the internal logic of the law, and is relatively unaffected by economic and social forces external to the law. An example of a body of law which, at least in its detailed ramifications, might seem obviously to fit this paradigm would be the bizarre "Rule in Shelley's Case."[2] According to this paradigm:

> [T]he Bubble Act, the common law, and legal hostility to the share market played significant parts in hindering the development of the joint-stock company for more than a century. After the passage of the Bubble Act, unincorporated joint stock companies were declared illegal by judges and their formation was harshly punished. Incorporation by the State was an expensive and complicated matter, granted only in exceptional cases. The legal framework was unresponsive to economic needs and delayed the progress of joint stock companies in England until well into the nineteenth century. (p. 4; footnotes omitted)

The ramifications of conceiving of the law in this way are various: for example, the legal elite is portrayed as isolated from commercial society, and ill-informed as to its needs and of the practice of the business community. Economic development is presented as coming about in spite of the law, or even, on occasions, outside the law entirely. There are indeed familiar examples of business practices that have evolved

2. Though, as I have argued elsewhere, that is only part of the story. *See* A.W.B. SIMPSON, LEADING CASES IN THE COMMON LAW 13-44 (1995) [hereinafter LEADING CASES IN THE COMMON LAW].

outside the common law; an example would be the early futures markets.[3]

According to an opposing paradigm, the law and the legal system are not viewed as autonomous, but rather as being reactive to external pressures and needs. When legal evolution was required by the business community, it swiftly occurred: "The law responded functionally to the economy and placed no restraints on growth during the industrial revolution" (pp. 5-6).

The law, according to this view, is not autonomous, but rather functional. The basic plausibility in this approach is obvious enough. After all, it was in England that the industrial revolution took place; by the mid-nineteenth century Britain had become the workshop of the world, and the first modern superpower. If an autonomous legal system, as postulated by the first paradigm, operated as a drag on development, how could such dramatic development have ever occurred?

A third possibility that Harris mentions but does not develop much at a theoretical level involves a compromise position (p. 7). According to this, the formal law is presented as indeed being autonomous, but the business community and their lawyers manipulated it, or even bypassed it entirely, so as to serve their needs. Law, according to this paradigm, is at the same time both autonomous and functional, but functional only because it is infinitely malleable. More radically, it could even be argued that according to this paradigm the forms of law, or at least of large areas of law, are simply irrelevant to economic development. Whatever the state of the law, the needs of the business community, or any other powerful social group, will be served. This way of looking at the matter is not unlike the claim, advanced by some writers wedded to the conception of economic efficiency, that efficient legal rules and institutions will drive out inefficient ones. The difference is that the claim is not so much that rules and institutions will change, but that they will be, in effect, distorted.

Harris's own position starts from the position that neither the autonomous paradigm, nor the functional paradigm can, by itself, satisfactorily explain the developments in the law of business organization in his period. The empirical evidence is incompatible with an analysis which fails to appreciate that law is both autonomous and functional or, to put it another way, that the autonomous character of law is in continuous tension with its functional character. So his aim is "to demonstrate the advantages of abandoning the poles and moving towards the center" (p. 8). Hence his interpretation "does not offer a simple and coherent thesis, as this cannot be supported by the complex nature of the interaction" (pp. 8-9).

3. *See, e.g.*, A.W.B. Simpson, *The Origins of Futures Trading in the Liverpool Cotton Market*, *in* ESSAYS FOR PATRICK ATIYAH 179 (Peter Cane & Jane Stapleton eds., 1991).

In addition, Harris emphasizes, as do most empirical historians, the importance of "in economists' jargon path dependency, exogenous shocks, and contingency. Many historians have, in fact, been aware of such factors for quite a while, though without theorizing about them or giving them fancy labels" (p. 11). A book whose starting point is the Bubble Act of 1720 is bound to pay attention to exogenous shocks, for the passage of this Act took place at the time of the collapse of the share market known as the South Sea Bubble, and all serious historians attach some significance to contingency and happenstance. The conception of path dependency is employed throughout the study in the contention that where legal institutions end up is often conditioned by the position from which they began, or, as the point is put in one passage by "the historical burden" (p. 40). In reading Harris's introductory theoretical discussion I could not but be reminded of those brief passages in which Oliver Wendell Holmes set out, in epigrammatic form, his limited but seminal ideas on the nature of law and legal development, ideas which he was, sadly, unable to either develop or use himself. In his claim that the life of the law has not been logic, but experience,[4] he put his faith in the functional paradigm. But in the following passage he argued that: "The substance of the law at any given time pretty nearly corresponds, as far as it goes, with what it then understood to be convenient; but its form, and the degree to which it is able to work out desired results, depends very much upon its past."[5]

Harris, in his account of the evolution of business organization, emphasizes the importance of a factor not to be found in Holmes, which is the process which produces legal change. For a theme which runs through this book is that the legal situation of groups of entrepreneurs was, in this period, the product of conflict and negotiation between rival interest groups, mediated through a political process rather than a process of adjudication. In a sense, therefore, what is involved in this study is not so much the relationship between law and legal change and economic development, but between the political process and legal development.

In order to make his account of the developments after 1720 intelligible, Harris gives a brief account of group organizations as they existed in the late medieval and early modern period. In the sixteenth century, the corporation, which was not originally associated with the world of commerce, was adapted for commercial use, and Harris provides a full chapter devoted to the pre-1720 business corporation, which was mainly associated with the establishment of monopolies devoted to overseas trade. Incorporation could come about only through

4. OLIVER WENDELL HOLMES, THE COMMON LAW 5 (Mark DeWolfe Howe ed., Harvard Univ. Press 1963) (1881).

5. *Id.* at 6.

a Royal grant under the prerogative powers of the Crown, or through a legislative ad hoc Act of Parliament; there was no general legislation permitting groups of entrepreneurs to achieve incorporation so long as they satisfied conditions specified by general law and went through some formal process of registration. By the early eighteenth century, there existed a relatively small number of joint stock business corporations, such as the Hudson Bay Company, the South Sea Company, and the Bank of England, which had been formally incorporated. There had also evolved an active share market, dealing in the stock both of incorporated business companies, and of companies that had not been formally incorporated. A scheme was promoted whereby the South Sea Company was to take over the national debt, with government bonds converted into stock in the South Sea Company. The scheme ended in disaster with a catastrophic collapse of the market. The Bubble Act of 1720 made it a criminal offence for any undertaking to purport to act as a corporate body in raising or transferring stock unless it had been authorized by Royal Charter or Act of Parliament,[6] and was at one time generally explained as a reaction to the collapse of the South Sea Bubble. Harris, however, thinks this is incorrect. The Bubble Act was, in fact, promoted by the South Sea Company itself before the crash. But the context in which the Act was passed associated it with a suspicious and hostile attitude to operations by unincorporated companies, whose promotion was associated with fraud and the encouragement of wild and hazardous schemes, an attitude that long persisted, and that was combined with hostility to those who dealt in shares of such companies. But for a long time, the provisions in the Act which adopted a punitive attitude to unincorporated joint stock companies with transferable stock were a dead letter, and the criminal provision in the Act was only once invoked in this period.

In the period following the Bubble Act there was an important change in practice. The Crown adopted a restrictive policy toward the grant of new charters of incorporation. This left entrepreneurs with two alternative strategies. One was to employ forms of business association that did not involved incorporation. The other was to promote Acts of Parliament, known as Local and Personal Acts, under which they could enjoy the advantages of incorporation. This mechanism for incorporation depended for its validity upon the sovereign powers of Parliament, which could enact not only general legislation, but also particular legislation relating to a single person, as in the case of divorce Acts, or relating to a particular scheme of industrial or agricultural development.

So far as the first possibility is concerned, Harris gives a detailed account of the forms of unincorporated association which were on of-

6. The Bubble Act, 1720, 6 Geo., c. 18 (Eng.).

fer: in addition to family ownership and partnerships there were possibilities in the trust, employed in schemes of road improvement, for example, in the turnpike trusts, and outside the world of the common law there existed the system of ship ownership under the Court of Admiralty, and the system of cost book accounting operated by mining companies governed by the stannary law of the hard rock mining world, which was predominantly located in Cornwall. Given some ingenuity, entrepreneurs could operate as unincorporated companies, relying upon schemes that made use of normal contract law, of partnership law, and the trust.

In Part II of his book, Harris explores the relationship between economic and commercial development in particular fields and the forms of organization employed. Why was it that in the eighteenth century, after the invention of the joint stock corporation, forms of unincorporated business organization continued to be employed in some sectors of the economy, for example in insurance and in highway improvement, but not in others, such as in some other sectors of the transport industry, in particular the building of canals and the improvement of navigable rivers? Why the divergence? Why indeed did it take so long for the joint stock corporation, once invented, to achieve a dominant position? Was it that it was not in reality of superior efficiency? Or was it that the conditions in which it did possess superior efficiency simply did not exist in the eighteenth century? Or was it that there existed costs or other entry barriers associated with incorporation which were sufficiently serious to persuade entrepreneurs that it was preferable for them to operate through unincorporated forms?

Harris argues that the joint stock corporation as a form of organization had significant advantages over unincorporated forms, and that, at least in some sectors of the economy, the conditions in which it was superior existed in the period under consideration. But with the declining use of the Royal prerogative power to grant corporate status by charter, entrepreneurs had to rely upon private Acts of Parliament and this had the consequence of subjecting incorporation to political control. It was not the costs of promoting an Act that served as the impediment, for these were relatively modest, but rather the fact that the procedures involved gave an opportunity for rival interest groups to combine in an attempt to block the scheme. Thus, for example, existing insurance corporations, operating within a nationwide market, had an incentive to prevent a new group of entrepreneurs joining the club by securing a private act, and were able, by exploiting the political character of the parliamentary procedures, to make it extremely difficult for such an act to be obtained. But since no nationwide corporation engaging in river improvement existed, a group of entrepreneurs who promoted a new scheme for a particular river was not likely to encounter the same sort of opposition from vested interests. This

explains the divergence between the forms of organization typically used in these two sectors of the economy. There were numerous private acts for river improvement, but few in the world of insurance.

Harris does not rely solely on this explanation for divergences in the use of the corporate form. There were other explanatory factors involved; where production was organized in relatively small units operating in particular localities, the continuous interrelation between actors might encourage personal trust, thus making the advantages of the corporate form less important. In the course of the eighteenth and early nineteenth centuries, Parliament did not establish any clearly settled or general principles to guide itself in granting or refusing to grant incorporation by private act: "[N]o clear policy or general criteria existed for incorporation during much of the eighteenth and early nineteenth century [sic]. Incorporation was granted or refused on the basis of the level of opposition of conflicting vested interests" (p. 136).

But if there was no body of settled criteria, there were trends, and there was an important development, which was the outcome of political processes rather than of autonomous legal evolution. This was the progressive curtailment of the association between incorporation and monopoly — a target for the political economists. By 1833, when the Bank of England's monopoly in the issuing of notes was curtailed, this association had largely disappeared, so that a characteristic generally shared by approved schemes of incorporation was that they were not schemes involving the grant of legal monopoly powers. The joint stock corporation had become a mechanism for facilitating competition in a free market; in origin it had been a mechanism for the establishment of trading monopolies. Its economic function had been transformed.

Harris's general explanation is convincingly argued, but gives rise to a puzzle — why did the use of incorporation by charter under the prerogative decline in the eighteenth century? The process is an aspect of the steady rise in the conventional power of Parliament at the expense of the Crown, and the explanation for this essentially constitutional development largely lies outside the scope of this book. From a positive point of view, Harris's analysis of the evidence is part of a literature that emphasizes the central importance of the private bill as an instrument of economic development during the agricultural and industrial revolution.[7] There is a considerable body of writing on the history and functioning of private bill procedure; we still lack a general study.

In the early nineteenth century, the Bubble Act, whose somewhat obscure provisions had long lain dormant, was revived, and by now it was the received wisdom that the Bubble Act had been a reaction to

7. *See* LEADING CASES IN THE COMMON LAW, *supra* note 2, at 218-20. Important recent books of relevance are J. GETZLER, A HISTORY OF WATER RIGHTS AT COMMON LAW (2000), and R. W. KOSTAL, LAW AND ENGLISH RAILWAY CAPITALISM 1825-1875 (1994).

the ill deeds of promoters of fraudulent schemes, operating unlawfully perhaps even at common law. So the legality of unincorporated business companies became an issue in the courts. Harris attributes this revival to the rapid expansion in the number of unincorporated companies promoted in the late eighteenth century, and to the lack of stability in the market for shares that characterized the period. It became clear that the provisions of the Bubble Act were alive and well, and that at least some unincorporated companies were illegal. There was a speculative boom from 1824-1825, and in 1825 the Court of King's Bench held, in the case of *Josephs v. Peber*,[8] that the Equitable Loan Bank Company, which had opened its books for the sale of shares without waiting for incorporation under a private act, was illegal, so that a contract for the purchase of its shares was void. In *Kinder v. Taylor*,[9] (also 1825) the Lord Chancellor, Lord Eldon, expressed the view that the unincorporated Del Monte Company might well be illegal not only under the Bubble Act, but also at common law. During this period, the judges and the legal system they controlled swam against the commercial tide in the name of paternalism. The law, presented as an autonomous body of doctrine protective both of the royal prerogative and the unwary investor, appeared unresponsive to well-established business practice and to economic and commercial needs. Parliament responded by repealing the Bubble Act in 1825. The member of Parliament who introduced the first Bill for the repeal of the Act, Peter Moore, stated in the Commons:

> At present the law in respect to these companies was very obscure and ill-understood .... The necessity of settling a question of so much importance was placed beyond question, by the amount of capital which was daily investing in these speculations, and which [it] would be safe in estimating at upwards of 160 millions.[10]

Moore, as Harris shows, was himself much involved as an entrepreneur in the speculations of the period, and had a vested interest in the repeal of the Act, which was in any event brought about by a Bill promoted by the Attorney General John Copley[11] on behalf of the government of the day. Copley thought that the correct strategy was to relieve Parliament of the burden of controlling grants of incorporation through private bill procedure, and to revive the practice of relying on Crown Charters. Applications for charters would be monitored, under the supervision of the Law Officers. Under such a system incorporation retained the character of a privilege; entrepreneurs were not to enjoy a right to incorporation.

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8. 3 B. & C. 639 (1825).

9. L.J. O.S. Vol. III, Cases in Chancery 68.

10. P. 262 (citations omitted) (quoting 12 HANSFORD'S PARLIAMENTARY DEBATES 1279).

11. Later Lord Lyndhurst.

One of the characteristics of the modern joint stock corporation is the enjoyment of limited liability. In the case of partnerships, the limited partnership was only accepted in 1907;[12] the common law, unlike the legal systems of continental Europe did not recognize such an institution. There were, however, ways of providing for sleeping partners — one being to conceptualize them as lenders to the active partners, entitled to a share in the profits only in the form of interest on the loan, which might generate problems over the usury laws that limited interest rates. Another was to keep their identity a secret except to the active partners (pp. 29-31). The result was that the limited partnership did not play a significant role in business, though in the nature of things it may be difficult to know how much of a role it did play. The history of the association between incorporation and limited liability is both obscure and controversial, and Harris argues that the partial explanation for this "lies in the confused and inconsistent definition of limited liability by both contemporaries and historians" (p. 128).

Three different kinds of debt might be involved — debts of shareholders to the corporation, those of shareholders to third parties, and those of the corporation to third parties — and a number of different issues could arise and be separately answered. For example:

> Could shareholders, as such, be arrested for debts . . . and could they, alternatively or in addition, be liable to bankruptcy laws as far as debts were concerned? . . . Were shareholders liable for corporate debt only upon dissolution, or as soon as the unpaid debts were claimed? . . . Were shareholders liable only up to the sum of their paid-up capital? Could calls also be made for the unpaid balance of the shares they held in order to cover debts? (pp. 128-29)

In the course of the eighteenth century some of these issues were answered, so that for example ownership of shares in a business corporation did not turn a shareholder into a trader liable to bankruptcy proceedings. Occasionally, some aspect of limited liability was attached to a corporation under the terms of a private act, though Harris is not able to say how common this was. No doubt the matter deserves further investigation. But the general impression conveyed by the sources is that limitation of liability may not have seemed so important to early eighteenth century entrepreneurs as one might expect. One factor that operates today — the fear of extensive liability in tort law — hardly operated at all in this period. By the end of the eighteenth century, however, entrepreneurs, whether seeking incorporation by Royal charter or by Act of Parliament, regarded limited liability in one form or another as essential to success (p. 130). Harris does not really explain why this change came about, though he does note the cruel char-

12. By The Limited Partnership Act.

acter of contemporary law relating to debtors and bankrupts. By the early nineteenth century it came to be settled that limited liability attached automatically to corporations created by Royal charter, and it became common where incorporation was by private act to include a clause providing for it, though again Harris does not provide much in the way of detail as to the form of such clauses or their frequency. The whole subject needs further investigation, both to establish a narrative and to examine the significance of limited liability for economic development, since it seems that its recognition was not a prerequisite to the industrial revolution.

At the end of the period covered by this book, Parliamentary control over incorporation through private bill procedure was to be supplanted by the system of registration. Under this system, Parliament laid down the conditions under which any group of entrepreneurs could establish a business corporation not by negotiation with the Crown, and not through an essentially political process through private bill procedure, but by registration. Through registration they became subject to a scheme of regulation intended to provide members of the public with information which, it was supposed, would enable them to distinguish reliable companies from unreliable ones. In the concluding chapter of his book, Harris traces the steps by which this new approach to company formation came to be embodied in the Companies Act of 1844. It can be seen as part of a wider development, whereby a system under which the Parliamentary process was used to authorize or refuse authorization to particular entrepreneurial schemes, whether they were schemes for enclosures, for building docks, for constructing canals, or whatever, through a form of conflict resolution — each scheme being handled in isolation, was replaced by a system where Parliament settled on some general scheme of regulation that all entrepreneurs had access to and could be changed by subsequent general legislation based on experience. This change was part of a process that significantly altered the function of Parliament from a body primarily concerned with privately promoted legislation to one concerned with general legislation promoted by political parties.

Harris's study of the history of the forms of business association is an important one, written by an author with a mastery of a large body of literature, and always related to empirical evidence though continuously informed by a concern with theoretical issues. It is clearly written, and it is something of an achievement to have covered so wide a subject in a book of modest length. Like all good books it does not impose closure, but raises and suggests further lines of enquiry. It is a fine book that deserves a wide readership.